

5677

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X
UNITED STATES OF AMERICA : 13-CR-607

-against- US District Court
PHILLIP A. KENNER a/k/a Central Islip, NY

PHILIP A. KENNER, and
TOMMY C. CONSTANTINE a/k/a
TOMMY C. HORMOVITIS,

Defendants.: July 2, 2015
- - - - - X 9:30 am

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

For the Government:

KELLY T. CURRIE
United States Attorney
One Pierrepont Plaza
Brooklyn, New York 11201
By: JAMES MISKIEWICZ, ESQ.
SARITA KOMATIREDDY, ESQ.
United States Attorneys

For the Defense:

RICHARD D. HALEY ESQ.
For Defendant Kenner

ROBERT LaRUSSO, ESQ.
ANDREW L. OLIVERAS, ESQ.
For Defendant Constantine

Court Reporter:

Dominick M. Tursi, CM, CSR
US District Courthouse
1180 Federal Plaza
Central Islip, New York 11722
(631) 712-6108 Fax: 712-6124
DomTursi@email.com

Proceedings recorded by mechanical stenography.
Transcript produced by CAT.

5678

3 THE COURT: Before we proceed, there were three
4 outstanding issues from yesterday. One was the issue of
5 the special verdict on the conspiracy objectives. Also,
6 we didn't go back to this yesterday but, Mr. LaRusso, you
7 want to have additional time to think about whether you
8 wanted either a multiple conspiracy instruction or a venue
9 instruction to the jury.

Do you want either or both of those or not?

11 MR. LaRUSSO: Judge. On the first one, I am
12 going to withdraw our request for a special verdict so
13 that need not be addressed.

14 THE COURT: Okay. You made me do all the
15 research for nothing?

16 MR. LaRUSSO: I did research also. I actually
17 did the same, judge. Last night, rather than going home,
18 after looking at it and speaking to my client, we decided
19 to withdraw that.

20 On the venue and on the multiple conspiracies, I
21 haven't made a decision on it. I know the court wants to
22 do it today so for purposes of the argument I'm going to
23 rest on what I said before.

24 THE COURT: So you are resting on those for
25 purposes of Rule 29. You don't want an instruction to the

5679

1 jury?

2 MR. LaRUSSO: Not at this time. No.

3 THE COURT: What do you mean not at this time?

4 MR. LaRUSSO: I'm not going to ask for it.

5 THE COURT: Mr. Haley, you don't want any of
6 those instructions?

7 MR. HALEY: No, your Honor. I indicated my
8 inclination was to not request a special verdict.

9 THE COURT: I'm talking now about the venue and
10 multiple conspiracy.

11 MR. HALEY: No, sir.

12 THE COURT: Let me confirm that with your
13 clients on the venue.

14 Mr. Kenner and Mr. Constantine, under the law
15 you have the right to have the jury decide whether or not
16 there is venue with respect to each of the counts that
17 they are considering. That is one of the elements of the
18 crime, whether or not some aspect of the crime took place
19 in the Eastern District of New York, and your lawyers have
20 advised me they don't want me to give an instruction to
21 the jury where they decide that issue.

22 I just want to confirm that you are in agreement
23 with that.

24 Mr. Constantine?

25 MR. LaRUSSO: I apologize, your Honor. Just one

5680

1 moment.

2 (Counsel and client confer.)

3 MR. LaRUSSO: Your Honor, I apologize to the
4 court. This has been a very difficult topic. We have
5 been discussing it since actually before the trial. And
6 my client and I feel that this may come an issue later on,
7 after there is a verdict adverse to us, that venue may be
8 important. So I'm going to reverse myself and ask the
9 court to put in venue at this time.

10 THE COURT: I don't have the charge available.
11 You don't need to see the actual language.

12 MR. LaRUSSO: I don't. We had it in the last
13 trial so I know what it is.

14 THE COURT: Okay.

15 Mr. Haley?

16 MR. HALEY: Our portion is then academic, your
17 Honor.

18 THE COURT: You are okay with it being in,
19 obviously.

20 MR. HALEY: Yes.

21 THE COURT: Okay. So I will put it in.

22 And the only thing, I just want to go back to
23 yesterday, Mr. LaRusso, with respect to the special
24 verdict because as a result of the research, I just want
25 to make sure it is clear that I didn't suggest something

5681
1 that could be misunderstood. I said if there is a general
2 verdict, it is possible that the government could be
3 risking; if there were a favorable verdict for the
4 government, that they could be risking having that verdict
5 potentially validated on appeal if one of the three
6 objectives turned out to be legally insufficient.

7 After researching it last night there actually
8 is a case called *Griffin v United States*, 5012 US 46, a
9 1991 case, where the Supreme Court held that the due
10 process clause does not require that in federal
11 prosecutions, general guilty verdict in multiple object
12 conspiracy be set aside if the evidence is inadequate to
13 support conviction as to one object.

14 So it appears that there is no risk to
15 particular on that issue; that in fact if the jury came
16 back with a general verdict, if there was a fact that
17 there was an evidentiary insufficiency that were
18 determined by me on a Rule 29 or by Second Circuit later,
19 the law, based upon the Supreme Court, is that the verdict
20 still stands for reasons they articulate in that case.

21 I just wanted that to be clear because I
22 suggested that there was a risk that the government might
23 be taking but I don't think it is a risk.

24 But in any event I will put on the record even
25 though the request was withdrawn, in my discretion I was

5682

1 not going to do it in any event I just want to place it.
2 I won't wasting time now doing that, but I believe that to
3 be the case so the record is clear.

4 All right. Are we ready for the summations?

5 MR. MISKIEWICZ: We are.

6 MR. HALEY: Your Honor, one request. I'm not
7 sure how long summation of Miskiewicz will be but I assume
8 when it concludes we will take a break.

9 THE COURT: Yes. He said about two hours so I
10 was going to go for, it is 9:55, about an hour or so and
11 then take a break.

12 Mr. Miskiewicz, do you still think your
13 summation is about two hours?

14 MR. MISKIEWICZ: Based on going through it last
15 night, I might have to revise it. It might be a little
16 bit over two hours but is not by much.

17 THE COURT: That is okay. Since we are only
18 doing two today, we have a little bit of leeway.

19 MR. MISKIEWICZ: I would definitely be shooting
20 to be done by the usual lunch break.

21 THE COURT: Whenever he is done, we will break
22 for lunch.

23 MR. HALEY: Thank you, sir.

24 THE COURT: Let's bring in the jury.

25 You have received the revised charge. And there

5683

1 are no issues with the revised charge?

2 MR. MISKIEWICZ: No, your Honor. I looked at it
3 last night.

4 THE COURT: Mr. Haley, any issues with the
5 revised charge?

6 MR. HALEY: No, your Honor.

7 (The following ensued in the presence of the
8 jury at 10 am.)

9 THE COURT: Please be seated.

10 Good morning, members of the jury. Good to see
11 all this morning.

12 I see a red-white-and-blue theme. That could
13 not have been an accident.

14 As you know, we are entering the next phase of
15 the trial, the closing arguments, or the summations, as
16 they are called. Before the lawyers proceed, I just want
17 to give you a few instructions.

18 First, I just want to point out that Mr. Semple
19 did check with his office regarding that exhibit and they
20 verified that the copy of the worksheet that they have in
21 their file is identical to the one that was put in
22 evidence. There was a blocked out portion on a page, so
23 there is no additional exhibit to put into evidence. That
24 is the way it was in their file as well.

25 With respect to the instructions that relate to

5684

1 the summations, let me give you several instructions.

2 First, I mentioned this to you in the beginning
3 of the case, which is a long time ago but I will emphasize
4 it to you. The statements by the attorneys in the opening
5 statements and in the closing statements are not evidence.
6 Statements by attorneys are not evidence. They are their
7 arguments about what they think the evidence showed or did
8 not show in the case. And you are free to accept or
9 reject those arguments, as you see fit.

10 I just want to emphasize that they are not,
11 their arguments and statements are not evidence. To the
12 extent that they say during their summation that the
13 evidence was, the testimony was, and this is what the
14 government's testimony or evidence during the trial was,
15 and your recollection of the testimony or evidence differs
16 from what the attorneys say, it is what your recollection
17 is of the evidence that controls; not what an attorney
18 said the evidence was.

19 And if there is any doubt during your
20 deliberations, if you are not sure or you don't remember,
21 as I have told you, you can request a readback of any
22 portion of testimony from the court reporter. You can
23 also ask for any physical exhibit, any recording to be
24 played back to you. Any piece of evidence in the case
25 that you want to hear or see again is available to you

5685

1 during your deliberations.

2 The next thing is, I do let the attorneys in
3 their summations comment on what they expect I'm going to
4 tell you on the law. So you may hear an attorney during
5 the summation say I expect Judge Bianco to tell you that
6 the law is X. They are allowed to do that, with the
7 understanding that obviously if they say something about
8 the law during their summation and then when you hear my
9 instructions on the law it differs, it is what I say about
10 the law that controls, not what an attorney says during
11 his or her summation.

12 I've gone over my instructions with them so they
13 have some idea of what I'm going to instruct you on.

14 Finally, you may remember that during the course
15 of the trial I instructed you that it was not proper for
16 an attorney during questioning of a witness to comment on
17 demeanor during the questioning. However, I just want to
18 emphasize that attorneys are permitted during their
19 closing statements to make arguments about the
20 credibility, including the demeanor, of the witnesses.
21 They are free to do that in their summations. So it is
22 not improper for them to make reference or arguments to a
23 witness' demeanor in their summation.

24 Again, like all their arguments, it is up to you
25 to decide whether to accept or reject any argument that

Summation - Miskiewicz

5686

1 they may or may not make in that regard.

2 With those instructions we will proceed. As I
3 told you the government, it is their burden of proof at
4 all times so they go first. And they also go last. They
5 will have a rebuttal summation on Monday because they have
6 the burden of proof.

7 So we will proceed with the government's
8 summation by Mr. Miskiewicz.

9 SUMMATION FOR GOVERNMENT

10 MR. MISKIEWICZ: Thank you, your Honor.

11 May it please the court, ladies and gentlemen of
12 the jury, counsel.

13 Before I really begin, you will see over the
14 next several hours and into Monday our adversarial system
15 at work. And I will use this line only one more time. I
16 do not think we will agree on many things but I'm sure I
17 can speak for all the attorneys in this case, and
18 certainly in behalf of the government, that your
19 attention, your dedication, your willingness to give up
20 many, many days and weeks has both honored you and honored
21 those of us who serve the Constitution through this place.
22 And I thank you.

23 Enough buttering you up. Let's go.

24 It took nine week to gets here. I'm going to
25 submit to you that over that nine weeks you experienced a

Summation - Miskiewicz

5687

1 microcosm of what Michael Peca, Kristin Peca, Darryl
2 Sydor, Steve Rucchin, Glenn Murray, all the other hockey
3 players experienced over more than a decade.

4 And I'm also going to submit to you that there
5 were two facets, who aspects, of what you experienced. A
6 quick-and-simple and a long, drawn-out, and complex story.

7 Those two, I'm going to suggest to you, will be
8 valuable as you go through the evidence and begin to
9 deliberate impartially and objectively, because, on the
10 one hand, the frauds probably took the least amount of
11 time over the last nine weeks to show you.

12 They were done at the speed of light, at the
13 speed of wire transactions. The deception, the
14 misinformation, the material omissions that prompted all
15 the those victims do part with their money and give it to
16 the defendants in this case and I'm going to go through
17 it, happened. And I submit to you happened with
18 overwhelming evidence. And the telling of that story was
19 fairly simple.

20 What took a long time in this case over the last
21 nine weeks was the deceptions, the coverup, the lies, the
22 diversionary tactic of: *It's this guy's fault; it's that*
guy's fault; it's that guy's fault.

24 And I believe that when you go back there, you
25 should look at both of those facets of the evidence that

Summation - Miskiewicz

5688

1 was presented to you, not only because on the one hand you
2 must, as the Judge will charge you, line up that evidence
3 with the elements of the offenses that have been charged
4 in this indictment, but also because in that coverup,
5 which took us weeks to burn through, to shed a light on,
6 you will see evidence of intent to defraud.

7 You will see that from the get-go, from the very
8 beginning, these two men intended nothing but to steal the
9 money of those victims.

10 I say this, too. While that evidence is
11 important, while the evidence of the coverup is important,
12 I submit, because you can use it to infer the criminal
13 intent of these individuals, I would also warn you, don't
14 follow that hall of mirrors, that rabbit hole, because in
15 the end it is not just the coverup; it is the elements of
16 the offense that you will be charged. And that which we
17 will now go through you will see was proven, we believe,
18 with overwhelming evidence.

19 First, let me go through with you what the
20 indictment is and what is charged in the indictment.

21 Count One.

22 Count One charges Tommy Constantine and Philip
23 Kenner with a conspiracy to commit wire fraud. And there
24 were three objects to that conspiracy, and it lasted a
25 number of years.

Summation - Miskiewicz

5689

1 First, there was the Hawaii land venture, which
2 you heard about early on and throughout, really, through
3 John Kaiser and Chris Manfredi, all the records pertaining
4 to the Lehman closing. The Urban Expansion loan that you
5 heard about. The Centrum loan, which we will talk about.

6 The second object of that conspiracy, the second
7 manner, I suppose you can say, in which that conspiracy
8 was achieved, was through Eufora, Mr. Constantine's
9 prepaid credit card company, through which millions of
10 dollars went and also, I submit, disappeared into the
11 hands, solely for the personal benefit of the defendants.

12 Finally, there is the Global Settlement Fund
13 objective of this conspiracy. And, as you will recall,
14 and I'm sure you do, they are pertaining to the fact that
15 the defendants, by mid-2009, as the lines of credit
16 belonging to the hockey players were all defaulting, as
17 the hockey players are suddenly realizing they were
18 indebted, in some cases over a million dollars, and
19 started complaining and start sending desperate emails and
20 phone calls to their financial advisor Mr. Kenner, the
21 response was: We got a plan for you. We're going to go
22 sue Ken Jowdy.

23 And the evidence was, as you saw and we will
24 discuss in brief -- and, believe me, I'm not going to go
25 over every last piece of evidences. Don't worry, we are

Summation - Miskiewicz

5690

1 not going to be here for another nine weeks. But you will
2 see that the evidence was that much of that money just
3 disappeared and had nothing to do with Ken Jowdy's
4 litigation.

5 Judge Bianco will instruct you on the elements
6 of all the crimes and how the government must prove to you
7 unanimously beyond a reasonable doubt all of those
8 elements of all of the crimes.

9 As to wire fraud conspiracy, let me just can
10 touch on one minor thing -- not minor, I'm sorry, but one
11 of the portions of the instructions that he will give you,
12 and that is that essentially a criminal conspiracy is
13 different than the actual crime.

14 It is a criminal partnership. It is a separate
15 crime from the underlying wire frauds. And he is going to
16 tell you that there are a number of elements and that they
17 include that two or more persons, you must be convinced
18 beyond a reasonable doubt that two or more persons entered
19 into a particular unlawful agreement that's charged in the
20 indictment.

That the objective of the conspiracy was to commit at least one of those unlawful acts. And in this case at least Hawaii or Eufora or the GSF objective.

24 And, third, that the defendant that you are also
25 considering -- and you must consider them separately --

Summation - Miskiewicz

5691

1 knowingly and intentionally and willfully became a member
2 of that conspiracy.

3 That is Count One.

4 Count Two. Actually Count Two through Six. I'm
5 grouping this for a particular reason.

6 Count Two through Six pertains to the
7 substantive crime, to the actual defrauding of individual
8 victims in the taking of their money through fraudulent or
9 deceptive means, and in using the interstate and foreign
10 wires to effectuate that fraud. And both defendants are
11 charged in Counts Two through Six.

12 Counts Seven and Eight have to do with the Sag
13 Harbor property that you heard of, sometimes referred to
14 as the Led Better property, here in Suffolk County. This
15 pertains to, among other things, the wire transfers of
16 \$395,000 from Michael Peca's line of credit which he had
17 opened and which he testified he did so believing that it
18 was there to use essentially for startup or development
19 purposes and expenses repeated to Hawaii. Hawaii, not
20 Suffolk County.

21 In those two counts, Seven and Eight only, only,
22 Mr. Kenner is charged. Mr. Constantine is not charged in
23 those two counts.

24 And Judge Bianco will, again, instruct you on
25 the elements of those substantive offenses, the wire

Summation - Miskiewicz

5692

1 frauds, and he will explain to you what a scheme and
2 artifice to defraud is and how you must, again, find the
3 defendants that you are considering knowingly and
4 willfully participated in those schemes. And also that
5 the schemes used the interstate wires. He will charge you
6 on that.

7 I expect that, among other things, in defining
8 what fraud is, Judge Bianco will tell you that fraud is a
9 general term and, among other things, it means that it is
10 there to gain an advantage over another by false
11 representations, suggestions, or the suppression of the
12 truth or with deliberate disregard of the truth.

13 It is not stealing or pick-pocketing. It is
14 convincing somebody to part with their money willingly,
15 knowingly but without knowing all the material facts.

16 That is what fraud is. And that is what you
17 will have to decide whether or not the government proved
18 beyond a reasonable doubt.

19 Finally, Count Nine. Count Nine is the money
20 laundering count, actually money laundering conspiracy.
21 And again, both Mr. Kenner and Mr. Constantine are charged
22 in that final count.

23 Very briefly, I'm going to be talking about
24 money laundering because in many ways the evidence of the
25 money laundering dovetails with the evidence of the

Summation - Miskiewicz

5693

1 broader conspiracy to commit wire fraud as well as the
2 substantive wire fraud counts. And Judge Bianco will
3 charge you as to the individual elements that you must
4 find beyond a reasonable doubt.

5 But in sum and substance I will submit to you
6 that I anticipate you will hear that, again, there must be
7 a meeting of the minds, a criminal partnership between
8 Mr. Constantine and Mr. Kenner to commit this separate
9 conspiracy.

10 There must have been financial transactions with
11 the proceeds of the wire fraud. Not just any wire but
12 proceeds of the wire fraud. And Judge Bianco will explain
13 to you what *proceeds* means. And that the purpose of those
14 transactions wasn't just to take money out of an ATM
15 machine but was to conceal, to conceal ultimately the
16 disposition and the origin and the nature of the money
17 that was taken from these victims.

18 Let's talk about Count One. And I'm going to do
19 my level best to track the indictment and also keep this
20 as chronological, meaning, from Hawaii to the very end.

21 So as to Count One, let's talk about what that
22 evidence was and what the evidence is that the government
23 submits to you that we believe proved that these two men,
24 Kenner and Constantine, intentionally defrauded victims of
25 the money that they had intended for the Hawaii land

Summation - Miskiewicz

5694

1 venture.

2 And central to that is the fact that you heard
3 and saw exhibits and testimony that much of that money
4 that was raised to develop the Hawaii land was simply
5 diverted, diverted to the personal use of the defendants,
6 either in the form of cash to pay off personal bills or,
7 in the case of Mr. Kenner we submit the evidence is
8 overwhelming that it got him a partnership in a resort
9 down in Cabo San Lucas, Mexico, something that none of the
10 witnesses, I believe the evidence was, told you that they
11 intended their money, their lines of credit, to be used
12 for.

13 Remember what the Hawaii land venture was.
14 Chris Manfredi, John Kaiser months after 9-11 go to
15 Hawaii. They find in that paradise 200 some-odd acres of
16 undeveloped land for \$750,000. You can't even find a
17 parking space in parts of New York for that money. And
18 maybe it was too good to be true, but they put their money
19 down on it and think sought to follow the American dream
20 and develop it into something.

21 Mr. Kaiser told you that the goal was either to
22 use his own and Manfredi's own money to build, or at the
23 very least subdivide and therefore add value to, the
24 property and make it more likely or more possible for some
25 other developer to come and do what we have heard now is

Summation - Miskiewicz

5695

1 vertical construction.

2 I never heard of vertical construction before
3 this case. I always thought it was just building. But
4 you know what that means now. Vertical construction.

5 Along comes Mr. Kenner, about a year after that,
6 and tells the two of them -- and again I'm paraphrasing,
7 your recollections controls, the transcript controls what
8 the testimony was -- but in sum and substance Mr. Kaiser I
9 believe told you that Mr. Kenner represented himself to be
10 somebody who could provide the financing to do this.

11 He said that his recollection was he recalled
12 Mr. Kenner saying he was worth half a billion dollars,
13 \$500,000. And I know you heard in cross-examination
14 something about Michael Jordan only being worth a billion
15 dollars.

16 Again, this is one of those mirrors down which
17 you can follow and get lost in. It really, I submit to
18 you, doesn't matter, for purposes of what Mr. Kaiser said
19 overall, whether he said he was worth half a million or
20 half a billion. What mattered is, both he and Manfredi
21 were convinced that this was a man who could help them;
22 that Mr. Kenner was a man who could help them finance
23 this project because of his access to hockey players and
24 others.

25 Only that is not what happened. Now we have to

Summation - Miskiewicz

5696

1 go to the other side of the story, the other people who
2 were also dealing with Mr. Kenner at this moment, his
3 hockey players; the people who, by the way, and I cannot
4 ask you enough to recall this aspect of every one of their
5 testimonies.

6 They were not customers of Mr. Kenner. They
7 were not there to sort of there to sort of trade and
8 bargain. They were not businessmen trying to get one up
9 on Mr. Kenner.

10 Mr. Kenner was their financial advisor. One of
11 the players called him my Jerry McGuire, if you remember
12 that movie, that they got so close. And you heard that
13 from many people including Mr. Kaiser, who you saw a
14 photograph of Kenner at a church function for Mr. Kaiser's
15 family. They trusted him. That was the relationship.
16 They entrusted him with their money.

17 And you heard that that money, yes they make a
18 lot of money for a short period of time as hockey players,
19 but that money was, for the most part, like their
20 retirement funds; what would be there for them after
21 hockey was over. And player after player after player
22 told you what the deal was as represented to them by
23 Mr. Kenner with respect to investing in Hawaii.

24 Michael Peca. And again, you will have the
25 entire transcripts, any portion that you wish to have read

Summation - Miskiewicz

5697

1 back during your deliberation.

2 But among other things, and I'm not going to
3 read the entire thing, at page 31 he says the investment
4 was in two pieces. There was \$100,000 cash portion that
5 was invested, and then there was going to be a line of
6 credit for \$1.775 million that I had the ability to do.
7 That was also going to be invested, which was going to be
8 used, I was told, to expedite some of the vertical
9 construction, building some ramps, infrastructure, things
10 like that. And that was to give me roughly 12 to 13
11 percent of Little Isle IV.

12 And let's not forget what Little Isle IV is.
13 Little Isle IV was essentially the parent of all the
14 Hawaii LLCs, controlled by none other than Philip Kenner.
15 The operating agreements. The bank accounts. Everything.

16 Tyson Nash. And again, it is there for you to
17 read, but at page 1908 he says so in general -- well:

18 Question: So in general terms what was your
19 understanding of how the money would be used?

20 Answer: To buy land.

21 Question: Did he ever tell you that the money
22 would go to other investors?

23 Answer: No.

24 Did you authorize money to go to other
25 investors?

Summation - Miskiewicz

5698

1 No.

2 Did he ever tell you to the money would go to
3 Mexico?

4 No.

5 Did you authorize money to go to Mexico from
6 your Hawaii investments?

7 No.

8 Joe Juneau. Remember Joe Juneau? First witness
9 on the stand. Went to school with Mr. Kenner at RPI.
10 They were teammates playing college hockey.

11 Page 327, long ago. Nine weeks ago.

12 Question: What does Hawaii have to do with
13 Mexico? Does it?

14 Answer: I don't -- I don't -- I mean, the only
15 relation to me is that it's the same financial advisor,
16 Mr. Kenner, who advised me to go into both.

17 Were they separate deals?

18 I think so. Yeah.

19 You know, when somebody says: I think so, yeah,
20 you should say well, wait a second. Is that an answer?
21 Is that, obviously it is an equivocation.

22 He didn't just, though, answer. There was more.
23 Or I should say, the government didn't just produce the
24 answer that the witness gave. There was more to this.

25 Government Exhibit 733. This was an email June

Summation - Miskiewicz

5699

1 17, 2006, between Joe Juneau and Phil Kenner.

2 And remember, many of these emails you have got
3 to read the bottom and then work your way up. They are in
4 kind or reverse chronology.

5 So you look at the bottom, at what Joe Juneau
6 says. He says: Phil. I realize it's hard to read so let
7 me read it here.

8 Phil, can you tell me, it says 750,000 on the
9 contract? Didn't I initially sign for 100,000? 3 percent
10 of the investment from Little Isle. Also 3 percent in the
11 whole Hawaii deal? Joe. And Mr. Kenner's explanation is
12 there.

13 But he extent say anything about, you know, some
14 of your money went to Mexico. Basically, all he says is,
15 he explains what the line of credit was and how much he
16 now has invested in Little Isle IV, Hawaii, and also gives
17 him an estimate of what the, quote, whole Hawaii deal is
18 worth, parentheses appraised land approximately 90 million
19 right now.

20 He doesn't say the land is worth approximately
21 90 million. You heard that appraisal. And there is no
22 issue. Take again. You can get lost in the sort of what
23 is important and what is not. But the fact is, the land
24 was appraised at. Fine. Great. That's why Manfredi and
25 Kaiser invested in it in the first place.

Summation - Miskiewicz

5700

1 But he doesn't say, as he could here: *The
2 Hawaii land is worth 90 million. By the way, remember Ken
3 Jowdy? I told you about Ken Jowdy? That land is worth.*

4 No. It is not there. It would have been a
5 perfect time to say it, but it is not there.

6 So when Mr. Juneau says:

7 Question: Were they separate deals? I think
8 so, yeah. It is because of answers like that he got from
9 Phil Kenner. Talking only about Hawaii. Talking only
10 about his money going to Hawaii.

11 Back to Michael Peca, who was asked on
12 cross-examination about the loan agreement, the pledge
13 agreement. All of those are in front of you.

14 There is no question here that these men signed
15 pledge agreements. They, to a greater or lesser extent,
16 got better or lesser information. This case is not about,
17 you know, you didn't tell them everything. There is no
18 question they signed a loan agreement with Northern Trust,
19 the lines of credit. That is not what the fraud and the
20 misrepresentation alleged in this aspect of the conspiracy
21 is about.

22 But what it is about is what that money was to
23 be used for. And when he was asked on redirect, and we
24 are jumping ahead now, questions about yes invested in the
25 Global Settlement Fund.

Summation - Miskiewicz

5701

1 Question: By the way, what if anything did that
2 litigation regarding Mexico have to do with the 1.775
3 million in your line of credit that you authorized for the
4 Hawaii investment? What if anything?

5 Answer: Nothing.

6 To this day, as you saw him on the stand, he had
7 no idea until this trial and what came out and what he was
8 confronted with and shown in exhibits where his money
9 went.

10 Brian Berard, another victim. What about
11 investing portions of your line of credit to places let's
12 say in Mexico?

13 Answer: No.

14 And listen to what else he says, because this is
15 characteristic of a number of the victims, these hockey
16 player victims, because they had both invested in Ken
17 Jowdy, Phil Kenner, properties in Mexico. El Rosario, you
18 hushed about. Cabo San Lucas. They knew that they had
19 money down there.

20 But the Hawaii money? The Hawaii line of
21 credit? Look at what Brian Berard says. At that time I
22 was already invested. One was in the El Rosario property
23 in Mexico. And then the other was in Cabo San Lucas. And
24 my investments were 500,000 on El Rosario property and
25 200,000 on the Cabo San Lucas property.

Summation - Miskiewicz

5702

1 And I submit to you that if you read the rest of
2 his testimony, and we will come back to this later, he had
3 no idea nor was he advised by the defendant Kenner that
4 his money would be spent, his line of credit would be
5 spent, down in Hawaii.

6 By the way, John Kaiser is not only involved in
7 finding the property and beginning the process of
8 attempting to develop it. He is also a victim.

9 He testified, and this is at page 975, I will
10 just point out to you or paraphrase very briefly, that in
11 or about July of 2005 he is asked by Phil Kenner, this is
12 after Kenner suggests to him that he has the money to help
13 develop the property on his own, Kenner asks him for a
14 million dollar loan.

15 Remember what Kaiser does? He pulls together
16 money from his mother, you saw his mother testify, and
17 others, and they pull together a million, and basically
18 that is the last he ever sees of it.

19 He also, by the way, was told, and remember, the
20 reason we are here in Long Island is because the
21 allegation is that portions of the conspiracy affected and
22 wires touched upon the Eastern District of New York.

23 He says, at 975, that he got a phone call from
24 Kenner asking him for that wire. And where was he? He
25 says, I was home in Suffolk County when he got that. And

Summation - Miskiewicz

5703

1 he pulled together the money.

2 And what does he find out about where it goes?

3 He is told it is going to be a short-term loan. 15
4 percent, 30 days, 60 days, 90 days, years go by. When
5 does he finally find out what happens to the money? Just
6 before the Lehman closing, when he testified that Mr.
7 Manfredi accused Kenner of basically lying to them. His
8 partners in the Hawaii deal. And that is when he
9 realizes, or he is told by Mr. Kenner, your money didn't
10 go to Hawaii. It went to Mexico.

11 And in sum and substance like of like: *Does it*
12 *really matter?* I mean, it is a million. What's a million
13 dollars among friends? Does it really matter?

14 Even Sergei Gonchar, the man who was so happy
15 with Mr. Semple's, whatever that was. Remember
16 Mr. Semple, the accountant hired to look at the Global
17 Settlement funds? And you know basically didn't do an
18 audit. Didn't really do an examination. Just based his
19 work on whatever he was told by Mr. Constantine. And if
20 he wasn't told anything by Mr. Constantine, then really
21 that was it, and he even says he couldn't even reach a
22 conclusion.

23 There is an old computer expression for that:
24 Garbage in, garbage out. That was what Mr. Semple's
25 testimony amounted to. But even Sergei Gonchar, the man

Summation - Miskiewicz

5704

1 who. According to Mr. Semple was like: Oh, I'm fine.
2 I'm fine. Yes, Global Settlement. Yes, I'm fine. Just
3 don't tell my wife about playboy, some joke like that.
4 Very funny.

5 When he was asked about his money with respect
6 to Hawaii, he says:

7 Answer: Not when the deals were introduced to
8 us.

9 And there is a question above that. You can
10 read it at page 4848.

11 Question: The money from Mexico was not
12 supposed to go as to Hawaii? They were separate?

13 Answer: I mean nobody told me that money was
14 going to go back and forth when the deals were presented
15 to me.

16 No. Even Sergei Gonchar.

17 Did they all forget that Mr. Kenner said to them
18 back in 2003, 2004, when their lines of credit were
19 indebted to the tune of \$13 million? Did all of those men
20 forget? Forget they had been told: Oh, well. You know,
21 it's Hawaii, it's Mexico. It's this. It's that.

22 Judge Bianco will instruct you that it is the
23 government's burden to prove all the elements of the
24 offense beyond a reasonable doubt. And he will charge you
25 on what reasonable doubt means. But I anticipate what he

Summation - Miskiewicz

5705

1 is going to say is, the words almost define themselves.
2 It is a doubt based upon reason and common sense.
3 Reasonable doubt is not a speculation or suspicion. It is
4 not an excuse to avoid an unpleasant duty. It is not
5 sympathy.

6 So what does, I submit, your common sense tell
7 you about the fact that all these men, these hockey
8 players, John Kaiser, said they were told their money was
9 going to be used for X, and the evidence has shown through
10 documentation, through bank records, that it went to Y. Y
11 in this in this case being Hawaii.

12 Listen to what Michael Peca and the defendant
13 Mr. Constantine say in their recorded conversation on July
14 12, 2012.

15 (Audio playing.)

16 *"I really appreciate your commentary."*

17 Now, why -- and I'm not trying to be sarcastic
18 or facetious about it -- the "*commentary?*"

19 But ask yourself, what does common sense dictate
20 at that moment? As elicited through cross-examination,
21 and direct I suspect, Mr. Peca was recording that
22 conversation unbeknownst to the defendant Kenner.

23 Wouldn't it have been, at that late date, 2012,
24 a great moment for somebody in Mr. Kenner's shoes to say:
25 Look, Mike. Like I told you a million times before,

Summation - Miskiewicz

5706

1 here's the documentation? Here's the email. Here's the
2 text. I told you a million times before. You agreed we
3 were going to send some of the money from Hawaii down to
4 Ken Jowdy in Mexico.

5 No. That is not what he said. "*I appreciate*
6 *your commentary.*"

7 Does common sense, does reason, does logic
8 suggest to you that that creates a doubt that: Well,
9 maybe, maybe they just all forgot? Maybe Peca and Sydor
10 and Rucchin and Murray and all these guys just forgot that
11 they had agreed, when they were thinking of Hawaii, they
12 also thought: Well, money can go down to Mexico, too?

13 No, I submit to you there is no reasonable doubt
14 that they were told their money was going to Hawaii and
15 that it was diverted, stolen, defrauded through omission,
16 deceit, lies.

17 There is a number of documents that you will
18 have to read and look at and study which also, we submit,
19 proves beyond a reasonable doubt, when you look at the
20 totality of the circumstances, proves there is no question
21 these men were lied to by Mr. Kenner about what the money
22 was for and where it was going.

23 You heard testimony that there was a loan in
24 December of '04, that Mr. Kenner flew down to Cabo San
25 Lucas and he signed or got Ken Jowdy to sign a promissory

Summation - Miskiewicz

5707

1 note and it was witnessed by some other guy. You heard
2 that. All right?

3 So now, does that cause you doubt? It should
4 cause you a moment to consider. It is evidence you must
5 consider. But does it create, through common sense and
6 reason, reasonable doubt that that ever really happened?

7 Think about it. That loan, agreement, is one of
8 the most important documents that any financial advisor
9 could have been handling hat that moment. Mr. Kenner or
10 anyone. It is not his money that he is loaning to this
11 guy Ken Jowdy. It is his players' money.

12 And again, I say it again, these players are not
13 customers. They are, you know, they are the men who are,
14 they are entrusting him: Take care of my money, manage my
15 money. Some of these guys didn't get through high school.

16 Joe Juneau's brilliant, bottom line is he is an
17 aeronautical engineer and he still said I didn't know
18 anything about money. He needed a guy like Kenner --
19 well, he thought he did -- to manage my money. So it is
20 their money.

21 Does he bring back an original? No.

22 Does he have two copies: Leaves one with
23 Mr. Jowdy and brings back the other one? No.

24 Does he, in all the texts all the emails, ever,
25 ever contemporaneous with the signing of that supposed

Summation - Miskiewicz

5708

1 document? And yes, I just used airports, because an I'm
2 telling right now, the evidence, I submit to you, is that
3 loan agreement is bogus. Never happened. Didn't exist.
4 Created as part of the hall of mirrors as part of the
5 deception and lies to divert attention away from these two
6 men.

7 And use your common sense and logic. Wouldn't
8 you, as a financial advisor, particularly in America,
9 where we sue everybody at the drop of a hat and if by some
10 chance a financial advisor loses his client's money, what
11 do you think is going to happen? Whether true or not,
12 fair or not, what is going to happen? Clients sue.

13 Being a financial advisor at that point, don't
14 you think that Mr. Kenner would say: You know what? This
15 is important. Let me bring my lawyer. Let me get a
16 notary. You keep a copy. I keep a copy. Like a closing
17 or something.

18 No. No. Goes down, Ken Jowdy's house that he
19 is renting. Doesn't keep an original. Apparently, Ken
20 Jowdy is renting a house that has a copier machine. Does
21 that sound plausible to you? Reasonable? Logical? No.
22 Bogus.

23 And that's all we got, th document, this piece
24 of paper saying: Oh, I hereby loan my clients' money to
25 Ken Jowdy down in Mexico.

Summation - Miskiewicz

5709

1 But it is more than just that. The bogus nature
2 of the loan agreement.

3 Just before the closing in Lehman in July of
4 2006 there was a letter to all the members of Little Isle
5 IV. The one I have that I'm showing you is marked Kenner
6 Exhibit 70. It came in under many other numbers, I think,
7 because various people signed the response form at the
8 end. This one happens to be I think Darryl Sydor.

9 And again, don't get confused about the: Oh,
10 that is his signature. It may very well be. It is not
11 the government's contention that every signature is phony.
12 There is one particular piece of evidence you heard about,
13 we will get to it, the fund raising agreement.

14 So they signed this agreement. Okay. Terrific.
15 Where does it say in this document that some of your money
16 is going to Mexico? It is not there. This would be a
17 good time. We are doing the stuff. This is the either
18 the state of the union letter or not the state of the
19 union letter, I forget how it was characterized by Mr.
20 Kenner in his testimony.

21 This would be a good time to say: Oh, and by
22 the way. It is not there. You know why it would be a
23 good time? Because Ken Jowdy is all over the letter.

24 In the second page of this letter, Ken Jowdy and
25 Bill Najam, under J&E, that is their holding company or

Summation - Miskiewicz

5710

1 LLC, are referred to as principals in the Cabo San Lucas
2 project. And they are referred to here as instrumental in
3 obtaining Lehman's loan commitment. And we look forward
4 basically to working with them in the future.

5 Perfect timing, contemporaneously, and everybody
6 would have had it and everybody would have seen it in July
7 of 2006 to say: Oh, and you know Ken Jowdy. He's part of
8 this family. This Mexico Hawaii investment family. He is
9 the guy we have loaned money to down in Mexico. And he is
10 doing a great job or doing a so-so job. We don't know.

11 Apparently, he was doing a good job, enough to
12 get 5 percent, 5 percent of the Little Isle IV venture.

13 So Mr. Kenner talks about Jowdy, talks about
14 Cabo San Lucas, gives him 5 percent essentially of, you
15 know, the hockey players' money, investment. Doesn't say
16 a word about any promissory note or loan or the use of the
17 lines of credit to go down to Hawaii. Not there. You
18 know why? Because he didn't need to come up with that
19 excuse. He just needed to hide it.

20 And you know how he hid it? In that same letter
21 where he is talking about how much money was raised, he
22 leaves out, pure math, he leaves out \$5 million, which we
23 now know, through the testimony and through the exhibits,
24 went to Ken Jowdy. He left it out.

25 He says we've raised 8 million. He didn't raise

Summation - Miskiewicz

5711

1 8 million from the players. He raised 13 million. He
2 just leaves out the 5 million. He lied to the players in
3 that letter. At the most critical moment.

4 That's how you know beyond a reasonable doubt
5 that there was no Ken Jowdy loan. There are was no
6 reference, no telling of the players: Oh, by the way,
7 your money is going to go elsewhere. Didn't exist.

8 And what else do we know? Look at Government
9 Exhibits 4502 and 4503, both of them in evidence. Also
10 signed, sealed, delivered just at about the same time the
11 Lehman loan is coming through, just about the same time
12 that letter is going out saying nothing about the loan.

13 And what do you find out? You find out, what
14 did that 5 million or however much more or less that
15 netted out to be, what did it buy Mr. Kenner? It bought
16 him a 39 percent interest in Ken Jowdy's Cabo San Lucas.
17 Didn't buy the players a 39 percent interest. Him.

18 And if you read it, you will see that Ken Jowdy,
19 himself, is only a 40 percent shareholder in the parent
20 company. Can't get too much closer to being equal
21 partners. To this day, right now, he is a partner in that
22 resort. That's where the money went. That's what it
23 bought him. And on the backs, on the portfolios, of the
24 hockey players.

25 Now, so far I haven't said much about

Summation - Miskiewicz

5712

1 Mr. Constantine. But again, looking at the evidence in
2 its totality I'm going to submit to you that even at this
3 juncture, even in the early days of the Hawaii objective
4 of the conspiracy, there is evidence in front of you that
5 both Mr. Constantine and Mr. Kenner are deeply, deeply
6 intertwined financially and, I submit to you the evidence
7 proved, as coconspirators, as criminal partners, not just
8 business partners.

9 Remember FBI forensic analyst Chris Petrellese?
10 I know those charts, some of them are so dense. They were
11 hard to even see up on the screen. But they are in front
12 of you now. Take all the time you want to pour over them.

13 Ultimately, what you are going to see, among
14 other things, and I have portions of one exhibit in front
15 of you, Government Exhibit 41. It shows that between
16 December of '04, right around the time the Hawaii venture
17 is getting off the ground, to March of '06, just before
18 the Lehman loan comes through, there is already plenty of
19 financial evidence that Kenner and Constantine are
20 financially intertwined.

21 Ula Makika and Little Isle IV are sending
22 millions to Mr. Constantine's CMG or Constantine
23 Management Group and, to a lesser extent but it is still
24 there, Constantine sends money back to Kenner in the form
25 of almost 200, a quarter of a million dollars, almost, to

Summation - Miskiewicz

1 GDM33.

5713

2 And remember, GDM33 is Guide Dog, Mr. Kenner's
3 company. One of Mr. Kenner's LLCs.

4 (Continued on the following page.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Summation - Mr. Miskiewicz

5714

1 MR. MISKIEWICZ: (Continuing)

2 So it's there. They're intertwined.

3 You also know it through the testimony, through
4 the testimony of some of the same hockey players.

5 I don't have this up on the screen, but let me
6 make reference to it just so you have it.

7 Government Exhibit 723, December 23, 2003. Very
8 early in the Hawaii venture Brian Berard is sending
9 \$100,000 to Eufora on the recommendation of Phil Kenner.

10 Michael Peca, at page 413 says that in around
11 2004 is when he submitted or invested in Eufora. Again,
12 at the recommendation of Mr. Kenner.

13 Owen Nolan, 2003, put in \$100,000 investment.
14 Remember Owen Nolan? He says at some point he wanted to
15 buy a stock in Eufora on the recommendation of Phil
16 Kenner. And he's doing it around the holidays. And he is
17 going to have some of that money from -- and some of that
18 investment he is going to give to his family, his brothers
19 at Christmastime.

20 And he calls Phil Kenner and he says, Do you
21 think I could get a certificate, a stock, something, you
22 know, some nice thing that I can hand to my family at
23 Christmastime other than the tree to show I'm giving them
24 this gift, this \$100,000 gift of Eufora.

25 And what does Mr. Kenner tell him? It's not a

Summation - Mr. Miskiewicz

5715

1 good time to do that now, not a good time. You can just
2 write him a note.

3 Imagine a family, Hey uncle Nolan, thanks,
4 thanks for the empty envelope. 2003 he invests.

5 Steve Rucchin same thing. 2003 he invest in
6 Eufora at the recommendation of Kenner.

7 Darryl Sydor, January of '04 about \$200,000 he
8 believed he had invested, again at the direction or at the
9 recommendation of Mr. Kenner.

10 So there is this financial connection between
11 the two. And then something very, very significant
12 happens for your consideration regarding Mr. Constantine's
13 involvement, knowing and intentional involvement in the
14 Hawaii object of the fraud. And it begins with what is
15 referred to as the Urban Expansion Loan.

16 And if you remember, James Grdina -- that's the
17 guy who said he needed a vowel in his last name -- puts up
18 money to help purchase one of those lots, the Waika Puna
19 parcel of land. And they do it through the creation of a
20 company that Regina (ph) creates with Constantine called
21 Urban Expansion. It's Government Exhibit 3801, it's in
22 evidence. You can read the whole thing.

23 And it lays out there who the capital
24 contributors are, what the relative contributions are
25 supposed to be from Mr. Grdina and Mr. Constantine.

Summation - Mr. Miskiewicz

5716

1 Grdina is supposed to put up three and-a-half million
2 dollars, and he does. Constantine is supposed to put up
3 one and-a-half million dollars, and he doesn't. Nothing.

4 Grdina is told that they need a total of \$5
5 million to close on Waika Puna. They don't. Mr. Kenner
6 in his examination admitted that's not what they need.
7 They needed far less than that.

8 But looking at Government Exhibit 3802. In
9 that, in the note, in the promissory note that Mr. Kenner
10 signs to get that money from Jim Grdina, they build into
11 it a prepayment penalty. It says, and this is in
12 paragraph 3, Borrower may not repay all the principal of
13 \$3,500,000 US dollars prior to October 15, 2010. This is
14 October 2005.

15 So any prepayment penalty over the next -- I
16 mean any payment of the three and-a-half million between
17 '05 and '010 would automatically result in a \$2 million
18 penalty. So they have to not only pay off the loan, but
19 they also have to pay Grdina and Mr. Constantine \$2
20 million. For what? I asked Mr. Grdina when he was on the
21 stand. And this is at 2374 and 75.

22 Have you ever seen a prepayment penalty that big
23 on that amount of a principal loan?

24 Answer: No, I have not.

25 Question: Did you insist on the creation of

Summation - Mr. Miskiewicz

5717

1 such a prepayment penalty?

2 Answer: No.

3 Question: Other than Mr. Constantine saying
4 that to his lawyer in that e-mail -- and the e-mail will
5 be for you to consider, but he is making reference to an
6 e-mail about the terms of the agreement here and the
7 prepayment penalty -- other than Mr. Constantine saying
8 that to his lawyer in that e-mail which he concedes to you
9 -- did you have any conversations with Mr. Constantine
10 about, Hey, we should get, you know, a 66 percent,
11 thereabouts, prepayment penalty?

12 Answer: No, I did not.

13 So in other words, there is only two people
14 coming up with the Urban Expansion Loan, actually only one
15 person coming up with case, and that's Jim Grdina, he is
16 not asking for an essentially 66 percent prepayment
17 penalty, it's all Tommy Constantine.

18 And where is that money going to come from?
19 Right. This is Kenner agreeing to pay not only back the
20 three and-a-half million, but Kenner agreeing, oh, if it
21 gets paid off in the next five years I'm going to pay you
22 two million. Where is that money going to come from? He
23 doesn't have it. It is going to come from the hockey
24 players. Or it's going to come from Lehman Brothers or
25 whatever it was that they were looking at at the moment to

Summation - Mr. Miskiewicz

5718

1 develop Hawaii. It's diluting the equity that the hockey
2 players did intend to put in for Hawaii. It's baking into
3 this fraud a way of basically stealing \$2 million for
4 nothing. Nothing, which is exactly what Mr. Constantine
5 puts into it.

6 And you know Mr. Kenner knew that the Lehman
7 loan was pretty much imminent. It would not get closed
8 for another, a lit less than a year.

9 But as he testified at page 4307 to 09, at the
10 time of the proposed Lehman closing in the summer of '05,
11 that's before the Urban Expansion Loan, before this \$2
12 million crooked prepayment penalty is cooked into the
13 books, he knew. In fact, he felt that he was going to
14 close in the summer of '05. And yet he goes ahead and he
15 cooks this with his partner Tommy Constantine into the
16 Urban Expansion Loan. And he goes on. And he says, there
17 were problems, and things happened. And in the eleventh
18 hour I told Lehman, you know, I'm not going through it.

19 But he knew in '05 before he signed the Urban
20 Expansion promissory note that the money would be coming?
21 What did he think? That Lehman -- he's going to back off
22 of Lehman and just wait for another five, six years and
23 not invoke the prepayment penalty? Of course he knew.
24 Common sense dictates he knew. Beyond a reasonable doubt
25 he knew, and of course Tommy Constantine knew because he

Summation - Mr. Miskiewicz

5719

1 was getting the big chunk of money. And again, for what?
2 Zero dollars that he put in.

3 Phil Kenner signed that promissory note,
4 Government Exhibit 3802, October 14, 2005. In other
5 words, months after he was this close to closing with
6 Lehman. And you heard that, you know, he continued to
7 look for other investors to replace Lehman.

8 And then look at the settlement agreement. I'm
9 not going to bore you with all of the financial records.
10 But there it is in black and white. This is the
11 settlement statement when Lehman Brothers does come along.
12 And there is the payment for Urban Expansion, \$6,935,000
13 and change to Urban Expansion.

14 Out of that \$2 million goes right to Tommy
15 Constantine for no reason at all. \$2 million that could
16 have been used for Hawaii. \$2 million that didn't have to
17 be wasted, diverted, wasted for the players, diverted away
18 from the players, diverted to Kenner and Constantine.

19 And look at, I believe there is a Chart 7. Look
20 at the flow of the money. Special Agent Josh Wayne, you
21 remember Josh Wayne's charts and carts. And these are
22 representations of a lot of documentation,, all of the
23 documentation that backs up these charts will be there for
24 your consideration.

25 But look at how this money flows. The \$6.9

Summation - Mr. Miskiewicz

1 million goes to Urban Expansion. The \$2 million goes to
2 Constantine, over \$2 million. And then from there,
3 Constantine spends it on things like Playboy and his car
4 racing business. And then look at where the rest of the
5 money goes. Some of it goes to pay for Mr. Kenner's
6 ex-wife's house. And some of it, just \$419,000 just goes
7 to pay off personal loans that Mr. Kenner has.

8 So he benefits even from this crooked deal, is
9 the only way I can describe it. Crooked, \$2 million
10 dollar prepayment penalty in Urban Expansion. Why? There
11 was absolutely no reason for it. Certainly the players
12 knew nothing about it.

13 There is another loan related to the Hawaii land
14 venture. And it has to do with, again, the fact that
15 money has already been diverted. And now more money is
16 needed.

What happens? At about the time of the Centrum
loan in December of '04, actually before the Centrum loan
the players put up 3.4, almost \$3.5 million to buy a
parcel of land called Honu'apo. And again, Honu'apo is in
the middle of those three parcels in Government 945.

Now this is what they thought all of their money would be used for. Their lines of credit would be drawn down, and it would be used maybe to purchase some land, or maybe used to build infrastructure, or whatever. Look at

Summation - Mr. Miskiewicz

5721

1 what happened.

2 Kenner admits at page 4637 that that Centrum
3 loan money was part of the 5 million he sent down to Ken
4 Jowdy. That is not what any of those men agreed to. And
5 what did they have to do, or what was going on at this
6 time? They were already highly indebted to Northern
7 Trust. Every single one of those men are.

8 Owen Nolan has over \$2 million in the ring. And
9 the deal makes no sense. They have to take a 12 percent
10 loan from Centrum. The players are already paying six
11 percent on their lines of credit. That's 18 percent.
12 There is no other way to characterize it on the same
13 money. They should just own Honu'apo. Instead they have
14 this debt. Why? So that Mr. Kenner can shovel more money
15 to his partner Ken Jowdy in Mexico.

16 And again, Special Agent Wayne showed you
17 through one of the charts, I believe it's kind of small to
18 read. I think this is Chart 4.

19 They end up mortgaging Honu'apo. And look where
20 the money goes. It goes to Mexico, obviously. And it
21 doesn't just go through Mexico, it goes through a series
22 of companies all controlled by Kenner, which you will see
23 time and time again that money, which I submit to you is
24 not only important for the overall wire fraud conspiracy,
25 but also important because it's part and parcel of how the

Summation - Mr. Miskiewicz

5722

1 money was, or financial transactions were designed to
2 conceal where the money went. It's part of the money
3 laundering. And of that there is Tommy Constantine again
4 getting \$650,000 out of the Centrum loan. For that? For
5 what? For nothing. Pure fraud.

6 And what does he get out of it? The Palms.
7 We'll talk about the Palms later, because you heard a lot
8 about the Palms units, the condos. He gets money to buy
9 this unit. It's night nice if you like that kind of
10 stuff. He gets that.

11 What do the players get? Red ink, debt,
12 nothing, stolen money. That is what they get. He gets
13 that, they get that.

14 I believe that Judge Bianco in instructing you
15 on how to evaluate if the evidence is sufficient to show
16 that there is a conspiracy among two people alleged to be
17 co-conspirators, we'll say, will charge you that among
18 other things that actions often do speak louder than
19 words.

20 And if you look at the Centrum loan, I can not
21 think of a more perfect example of proof beyond a
22 reasonable doubt -- actions speak louder than words -- no
23 reason to mortgage Honu'apo parcel. No reason other than
24 for Kenner to get his 39 percent. Because remember, this
25 is happening at the same time as, you know, some of the

Summation - Mr. Miskiewicz

5723

1 other transactions we have already talked about. To get
2 his piece of the pie, that resort in Cabo. No reason.
3 Actions speak louder than words. And in this case the
4 action is pure fraud.

5 Your Honor, may we take a brief break?

6 THE COURT: Yes, we'll take a recess.

7 Don't discuss the case.

8 (A recess was taken.)

9 (After recess.)

10 MR. LaRUSSO: Your Honor, while we're waiting,
11 the Internet is down. If someone can restart it? I was
12 just wondering.

13 THE COURT: We'll check. Did this just happen
14 this morning?

15 MR. LaRUSSO: This morning. Thank you, your
16 Honor.

17 (The jury entered the courtroom.)

18 THE COURT: Okay, Mr. Miskiewicz.

19 MR. MISKIEWICZ: Thank you, your Honor.

20 Very briefly to pick up where I left off.

21 Actions speak louder than words.

22 In the indictment it is alleged that among the
23 other manner or means by which Phil Kenner achieved the
24 objectives of the conspiracy, at least insofar as the
25 Hawaii portion of the fraud, is by concealing the amount

Summation - Mr. Miskiewicz

5724

1 of debt that had been wracked up by him on the backs of
2 the hockey players.

3 Look at those numbers. But for Urban Expansion,
4 a substantial portion of that debt could have been paid
5 off. But for Centrum, again, a substantial portion of the
6 debt could have been paid off.

7 You heard testimony that, yes, after the Lehman
8 loan everybody got back a little butt. But immediately
9 their lines of credit went back up.

10 And remember Aaron Mascarella, the former
11 executive at Northern Trust? At page 8 he is asked.

12 Question: What if anything did Mr. Kenner
13 instruct you about where the monthly statements for the
14 lines of credit would go?

15 Answer: He wanted us to send them to his
16 personal residence.

17 And you know then the FBI and IRS executed an as
18 warrant, search warrant at Mr. Kenner's house, they found
19 it, many of those records.

20 And why is that significant? Well, some
21 statements, some records did slip through the cracks. I
22 think you heard testimony that some records were mailed to
23 Mr. Peca and Mrs. Peca's former or temporary residence
24 when he was moving from one team to another. I believe
25 Mr. Ranford admitted that some of the lines of credit

Summation - Mr. Miskiewicz

5725

1 statements that came in evidence here had been mailed to
2 his summer address in Vancouver. So some, there were
3 cracks, this was not perfect, this concealment. But look
4 at, again, what Mr. Kenner does to conceal the debt that
5 he is loading onto his players.

6 This is an e-mail, difficult to read maybe. I'm
7 not going to go over it line by line, what it says. But
8 it came in as a Kenner Exhibit in cross-examination of Joe
9 Juneau. He was the first person to confront his former
10 team mate and RPI classmate and now financial advisor in
11 this e-mail in 2007.

12 And he says, Phil, what is this Northern Trust
13 letter we just received? It says that my line of credit
14 -- he goes on -- secured by N T I M A S, is now 53 days
15 late. It says, advance of default. What is this? Please
16 explain.

17 What does Kenner say? Again, you can kind of
18 look at the bottom, and work your way up in reverse
19 chronology. He says, I paid off the LOC, meaning line of
20 credit. It's all good.

21 How did he pay it off? He just shifted money
22 from Owen Nolan's account to pay it off. That's all. He
23 didn't pay it off, Owen paid it off because Joe Juneau,
24 probably the longest person he had a relationship with,
25 Kenner had a relationship with, started asking questions.

Summation - Mr. Miskiewicz

5726

1 And from that moment on, what else do we know?

2 Well, look at the -- he was asked, Mr. Juneau,
3 about the extension of credit in the first place. Because
4 in that email and others he said that he was unaware that
5 he had a \$500,000, \$750,000 line of credit.

6 Government's 2155. This is the statement of
7 purpose for an extension of credit secured by margin
8 stock. This is secured by Mr. Juneau's portfolio. And
9 he said he signed it at the bottom there.

10 But then he was asked a series of other
11 questions about the center portion, part 1. He was asked.

12 Regarding the \$500,000, what is the amount of
13 credit being extended? In handwriting it says, \$500,000.
14 He was asked, Is that your handwriting?

15 And at page 170 he said, No.

16 Do you see there is two lines, still on
17 government's 2155.

18 Do you see there is, two lines down, it says, If
19 the answer is no, describe the specific purpose of the
20 credit.

21 Do you see that?

22 Answer: Yes.

23 What does it say?

24 Real estate investment.

25 Question: Is that your handwriting?

Summation - Mr. Miskiewicz

5727

1 Answer: No.

2 Question: Mr. Juneau, did Mr. Kenner ever tell
3 you that you were putting in \$500,000 dollars into the
4 Hawaiian deal.

5 No, never. Page 170.

6 And just remember, Little Isle IV for a period
7 of time had its own line of credit secured by Owen Nolan
8 and Juneau. And here he is saying, I have no idea.

9 And you know he had no idea because in 2007 when
10 he is e-mailing his financial advisor, his friend. He
11 says, What's this about?

12 And his friend says, It's all good. I paid it
13 off.

14 I? He paid nothing, Owen Nolan paid it off.

15 Although frankly Owen Nolan didn't even know he
16 paid it off. And how do we know that? I'm not going to
17 go through every one of these charts. This happens to be
18 Government 33 in evidence. But what I would submit to you
19 is essentially the Ponzi scheme portion of the Hawaiian
20 fraud.

21 And we charge in the indictment, the government
22 alleges in the indictment that there was a period of time
23 in which Mr. Kenner engages in these series of
24 transactions again and again and again. They are again, I
25 submit to you, relevant for purposes of the money

Summation - Mr. Miskiewicz

5728

1 Laundering conspiracy, but also how he conceals what's
2 going on.

3 Because look at the utter ridiculousness of
4 these transactions. Glenn Murray's line of credit. Owen
5 Nolan, Sergei Gonchar. Hey, I like GSS, there is no
6 problem. My wife's got Playboy, everything's cool. Even
7 he gets ripped off here. Steve Rucchin.

8 And in some cases remember the testimony was
9 that the yellow in the box to the right represents people
10 whose lines of credit is both being paid off and borrowed
11 against at once. It's ridiculous. It's like taking your
12 American Express and borrowing against it to pay off your
13 MasterCard interest payment, just interest.

14 And this goes on, and on, and on, until there is
15 no more money. And now Mr. Kenner has to start drawing
16 down whatever he can because there is no more money to
17 pay. And that is what really causes the house of cards to
18 begin to fall in 2009, in 2009 when the letters of default
19 start coming out to the hockey players. And they
20 certainly got all of those for the first time.

21 And you heard player after player saying, you
22 know, I came home from this trip or that trip and/or it
23 came in the mail and we were astounded. We had no idea.

24 Did they just forget? No. They were lied to.

25 They were concealed, or I should say the amounts

Summation - Mr. Miskiewicz

5729

1 to which they were placed in debt was concealed from them.

2 And again, let me say this. If there is any
3 suggestion in your part during your deliberations that
4 this is just, you know, the government wants a conviction
5 or something like that because people lost money in a real
6 estate deal, read the indictment again. Go back to Judge
7 Bianco's chart. That is not an issue.

8 Capitalism sometimes results in losses,
9 sometimes big losses. Certainly Lehman, we know has lost.
10 The difference here is, operative or material thefts were
11 concealed from these people. And that is why, and that is
12 why they didn't do anything for years, 2003, four, five,
13 sic, seven, eight, nine, nothing. Why? Because they had
14 no idea. And that's what makes it a fraud. They were
15 lied to.

16 Now there is evidence regarding a forgery. And
17 it relates to Government Exhibit 5104. If you will recall
18 the testimony that refers to John Kaiser about this
19 document. He did say funding consulting agreement.

20 It purports to give Little Isle IV, who remember
21 is controlled by Phil Kenner, basically agreeing to pay
22 Constantine Management Group, one of the co-conspirator's
23 various companies, CMG, a consulting fee for fundraising,
24 fundraising regarding -- for what? And there are two
25 agreements here, one was purportedly signed in December of

Summation - Mr. Miskiewicz

5730

1 '04. And the other one was signed in June of '05.

2 So you must -- first of all I think you can
3 consider does that somehow explain and give reasonable
4 doubt to the allegations of fraud? Because after all
5 there is this agreement. This is one of those areas where
6 I want to suggest to you there was a lot of time spent
7 talking about basically a deception.

8 This document, through the expert testimony,
9 through John Kaiser's testimony and through the
10 circumstances under which it was purportedly signed, I
11 submit to you prove beyond a reasonable doubt it's nothing
12 but a forgery, a fraud.

13 When it was created, who knows. But consider a
14 number of important relevant facts regarding this
15 agreement. It is signed by, among others, John Kaiser.

16 John Kaiser didn't control the money for any of
17 either the Constantine corporations or the
18 Kenner-controlled corporations. Why would he care? And
19 for that matter, what authority would he have to commit
20 player money to pay Mr. Constantine supposedly for raising
21 money? None.

22 And it's not just Mr. Kaiser who said it.
23 Government 103, an e-mail from Phil Kenner to Michael
24 Stolper. This is back, this is years later. And I'm
25 going to talk about the Stolper investigation or whatever

Summation - Mr. Miskiewicz

5731

1 that was later -- but he says in the excerpted part of
2 this e-mail.

3 I'm not sure that Kaiser ever signed an
4 agreement with Constantine on behalf of Little Isle IV,
5 LLC. Kenner was the managing partner, a managing member
6 of Little Isle IV, LLC not Kaiser. Kaiser has never been
7 a member of Little Isle IV, LLC.

8 So he had his own e-mail. John Kaiser has no
9 control to contract Little Isle IV with Constantine. He
10 is a third witness. You know what he is? He's a New York
11 City cop. And he's a good -- hey, let's get the cop who
12 is also our builder now that the FBI and others are
13 snooping around about what we're doing, let's put his name
14 on it. That is what that is.

15 You heard from an expert, a handwriting expert
16 John Osborne. It's at page 3627 he gives you his opinion.

17 With respect to each of the two signatures it is
18 my opinion that it is highly probable that the signatures
19 are attempted simulations not genuine signatures of John
20 Kaiser.

21 And Judge Bianco will instruct you as to how to
22 evaluate an expert's opinion.

23 Remember, this was what he was looking at. And
24 he gave you his reason. It's in the record. I'm not
25 going to repeat it. But the jitteriness of the

Summation - Mr. Miskiewicz

5732

1 handwriting, among other things, which frankly you know
2 you'll have the exhibit and you can look at it. You can
3 make your own assessment.

4 Judge Bianco will tell you that you're to
5 evaluate that witness like anybody else. And among the
6 things to look at are what are his qualifications. Well
7 you heard what his qualifications are and it's in the
8 record.

9 Does he have an interest in this case? And he
10 testified that he has been in the business for years.

11 It's a family run business. He has testified for
12 plaintiffs, for civil defendants, for criminal defendants,
13 and for the government. He has no interest in the outcome
14 of this. That was his opinion.

15 Something very also very, very important to
16 remember about that consulting agreement which I submit to
17 you proves beyond a reasonable doubt that it is a fraud.
18 It is a fraud to further the goals of the Hawaiian
19 objective of the conspiracy. And it's this.

20 Kenner testified that as with both the December
21 '04 and the June '05 agreements, he and Mr. Constantine
22 signed them in Scottsdale, Arizona on or about the dates
23 set forth therein. And then as to both he said, John
24 Kaiser wasn't around so I had him sign and essentially
25 backdate it the next time I went to Hawaii on a

Summation - Mr. Miskiewicz

5733

1 quote-unquote, due diligence trip to Hawaii.

2 And among other things he was asked at page
3 4306, Are you able, Mr. Kenner, to recollect the day that
4 occurred?

5 And specifically in this portion he is talking
6 about the June 1st of 2005 agreement in which he claims
7 that he had John Kaiser sign it. And he says, No, I am
8 not. I am not able. In other words, to recollect.

9 John Kaiser could. And I submit to you it
10 defies logic, the story about he went to Hawaii on among
11 other dates the June '05 agreement. You know why?
12 Because John Kaiser lost, his wife had just lost a baby in
13 June of that year. He testified he was still out of
14 commission at home June and July of that year.

15 In fact July is when he said he got that call
16 about the Hawaii \$1 million loan I mentioned earlier this
17 morning. He was still at home in Suffolk County when he
18 got that phone call. He remembered where he was.

19 And he was asked, Were you anywhere in Hawaii at
20 that time?

21 No.

22 Or Scottsdale Arizona?

23 No.

24 Kenner lied, pure and simple. He forged, or
25 somebody forged that signature to give it some patina of

Summation - Mr. Miskiewicz

5734

1 Legitimacy, because they needed a third a person to sort
2 of say, Oh, we're all one big happy family, right, John?

3 It's a forgery. Actions speak louder than
4 words.

5 Why do that? Other than you need now, whenever
6 this was created, and I submit to you it certainly wasn't
7 created on the dates set forth in these agreements. The
8 only reason you do is this is, again to create a hall of
9 mirrors, you know, get the FBI and the IRS off your tail.

10 Hey, one of your own, a cop, he signed the
11 agreement. Must be okay, right? A forgery. And there
12 is only one reason to do it. There are only two people
13 who benefitted from it. The reason was to continue the
14 concealment, to continue the conspiracy. The only two
15 people would benefitted from it was Phil Kenner and Tommy
16 Constantine. And you saw in black and white the numbers
17 through Urban Expansion and the Centrum loan as to how
18 they benefitted.

19 I'll talk just very briefly about one shorter
20 aspect of the Hawaiian fraud, and then we're going to move
21 on.

22 Discovery Harbor Lots. That is, you recall, a
23 small portion of land within the area of Waika Puna and
24 Honu'apo. Pure theft.

25 The money for Discovery Harbor Lots comes out

Summation - Mr. Miskiewicz

5735

1 March 24, '05 from Brian Berard's line of credit. Goes
2 through Big Isle IV, and it goes to the Fidelity National
3 Title Company.

4 And years later, now in 2013 the real estate
5 market has crashed. Whatever Discovery Harbor Lots was
6 worth, it's certainly not worth the money that was stolen
7 from Brian Berard's line of credit. But it sold.

8 And where does the money go? It goes back to
9 Mr. Kenner. Actually goes through Mr. Kenner's son's bank
10 account, out of which he then makes a series of
11 withdrawals. Which he says, he admitted he did on the
12 advice of Chase Bank employees to avoid the filing of a
13 currency transaction report.

14 Remember he testified about that. You know, if
15 he withdraw \$10,000 or more he would have to file a
16 currency transaction report. And the bank teller
17 suggested, maybe you don't want to do that. You know, I
18 could be here for nine weeks talking about the lies
19 Mr. Kenner testified to. Let me just give you one.

20 See where it says \$9,500 and \$9,000 both on
21 April 9, 2013?

22 You know, you remember what he said? He said, I
23 went to the bank teller and I wanted to withdraw more than
24 \$10,000. And the bank teller asked me, Do you really need
25 all of that money in one day?

Summation - Mr. Miskiewicz

5736

1 And I said, No. No, I'm good. I don't need --
2 whatever it was that he wanted to withdraw.

3 So that is yes told you it was the bank teller
4 who told him how to avoid the currency transaction report.

5 Black and white, it's a lie. Oh, one day, the very day,
6 the first day when he says, I went there and you know I'm
7 asked do I really need all of the money and no, I don't.

8 Yes, he did.

9 Because he either went around the block, or went
10 to a different branch. Because the same day he withdraws
11 another \$9,000, on the same day. How do you square those
12 two statements? She told me, whoever this teller is, she
13 told me how I could avoid a currency transaction, and
14 since I didn't need the money -- Yeah, sure I'll take the
15 money.

16 And on the same day he is back and withdrawing
17 the same amount of money. A lie. A bald-faced lie
18 about, granted a small portion of the overall fraud. But
19 this is something that you rightly can take into account
20 in assessing his testimony.

21 By the way, it's not just Brian Berard whose
22 money is stolen for the Discovery Harbor Lots. There were
23 several of them. Another one is, comes simply right out
24 of Darryl Sydor's line of credit. And again, it's the
25 same pattern. The money comes in, the money comes out of

Summation - Mr. Miskiewicz

5737

1 the line of credit for \$200,000.

2 I suppose if it stopped right there, one could
3 say, well, this is what Hawaii was intended for. This is
4 what the lines of credit were intended for. Brian Berard
5 and Darryl Sydor are helping Little Isle IV to purchase
6 land out of their lines of credit. Fine.

7 But it doesn't continue. It goes from Little
8 Isle IV to another company, which again I think we should
9 take into account and consider with respect to the money
10 laundering charge. And then a portion, actually \$86,000
11 of that \$200,000 goes again to the title company. And
12 then the same pattern, years later, real estate crash, he
13 sells it, he keeps the money. And then pulls it out in
14 two cash withdrawals.

15 And again, back to the, the state of the union
16 or not state of the union letter in July 2006. This is
17 the letter to all of his members -- this one I'm holding
18 up is Kenner Exhibit 93 -- you know, page 1 lists all of
19 the properties that are part of the Hawaii venture.

20 Little Honu'apo, Honu'apo, Waika Puna, Moaula --
21 sorry -- church, and the various percentages. There is no
22 Discovery Harbor, no Discovery Harbor. No way Brian
23 Berard or Darrel Sydor, even if they knew about what was
24 happening to their line of credit, could trace this
25 portion of the fraud.

Summation - Miskiewicz

5738

1 (Continued from the previous page.)

2 Totally concealed. Totally concealed.

3 Let's talk about Eufora. And again it may very
4 well be a good idea. No question patents were obtained.

5 The issue here is what did any of these people get for the
6 money that they were induced to part with? I submit to
7 you this object of the fraud which really takes hold in
8 late '08 through '09 and also dovetails with the
9 substantive wire fraud counts really shows how these two
10 men Kenner and Constantine are working hand in hand, not
11 as business partners but partners in crime.

12 We know from prior testimony in the deposition
13 that Mr. Constantine gave, you'll have the entire
14 deposition to read, those portions that were admitted, but
15 Government's Exhibit 8021-R, a portion of it, you can read
16 it for yourself, but he says in sum and substance when
17 he's asked what Eufora is, one of his answers is, really,
18 I mean, I was going to say it's not worth mentioning but I
19 mean in the sense that it's not a profitable endeavor.

20 Was it at some time?

21 No, it never has been to date.

22 When does he say that? April 23, 2009.

23 Jumping ahead you can talk about the Global
24 Settlement Fund in a little while, it's right at the same
25 time he's both getting other people involved in Eufora and

Summation - Miskiewicz

5739

1 pitching some of the same victims to get involved in the
2 Global Settlement Fund. You know, in his own words, it's
3 not much to talk about.

4 This came in relatively late in the trial.
5 Government 4717, Mia Edrozo you heard from I believe Mark
6 D'Ambrosio, who she was. This is March of '08, the
7 subject line. Please respond. Negative operating
8 balance. We have no float, no cash, no operating money.
9 The operating balance later in the e-mail is negative
10 18,000.

11 Kenner knows what is going on. At about the
12 same time, there's an entire book of text messages that
13 were admitted. You can look at them. I'll not go over
14 every one. These themselves told an incredible story
15 about a close relationship with the most intimate details.

16 During the testimony you heard, you know,
17 Mr. Constantine is telling Kenner about his girlfriend or
18 wife's credit card bills and the need to come up with
19 money and Kenner responds and helps him out, and there is
20 text after text like this.

21 April 8, 2008, about the same time, a little
22 after, that Mia Edrozo, says we have no cash, nothing. In
23 green, there is Constantine saying -- I'm sorry, PK, Phil
24 Kenner in green and that is the color throughout all of
25 those texts, Mr. Kenner is communicating in the green

Summation - Miskiewicz

5740

1 "bubbles" telling him about moneys he just sent to his
2 account.

3 On that day, April 8, 2008, \$100 it says is in
4 your account. Please call me about the Palms, PK.

5 Look at what happens to Michael Peca's line of
6 credit right about that same time. Actually one day
7 early, not \$100; 100,000 is invested but not in Eufora.
8 CMG, which again in those depositions you are going to
9 hear, you'll read Mr. Constantine made all kinds of
10 references to it essentially just a personal, you know,
11 bank account essentially, not something that is related to
12 Eufora, not what you heard in the last couple days somehow
13 the repository of a private stash of stock in Eufora.
14 It's something to separate his business accounting firm.

15 And, I mean, look at that. The 100 is in your
16 account. Look at what happens to Michael Peca. You know,
17 thanks, Mike.

18 Another series of texts in April of 2008, and
19 there are several of them here, I'll not read them. Going
20 on about -- it says \$17 for Hilton and you heard who
21 Hilton was, the guy that Mr. Constantine owed money to for
22 one of the properties. And a Florida lawyer that he needs
23 44, and it goes on like this, back and forth with ABA
24 numbers transmitted, 25 to 40k, you know. He's even asked
25 on April 24, 2008, Constantine asks: Is that Eufora

Summation - Miskiewicz

5741

1 money? And Kenner says yes. And look at what happens to
2 Tyson Nash's money, same period of time, April of '08,
3 100,000 goes in, goes into CMG, not Eufora, and then where
4 does the money get blasted out to? Compare this text with
5 the money trail and you'll see that 17,000 went to Kenner.

6 The 40,000 went to Wampler Buchanan Walker, a
7 law firm for one of Kenner's many lawsuits unrelated to
8 Eufora.

9 It goes on: I need 30k tomorrow. Dude, I
10 really have to spend the next week, I'm paying all of my
11 bills, there's racing, Cabo, Eufora. It goes on. There
12 are transactions, you will see, Mr. Ranford, Mr. Sydor,
13 his money going out to Playboy. It has nothing to do with
14 Eufora.

15 Again, Eufora was just an excuse, a deception,
16 an object, a way of stealing more money at a point in
17 which they desperately need money.

18 Dude, that's just half of the story. I have so
19 many people up my ass right now. And then enter Tim
20 Gaarn, a guy from New Jersey who testified here under the
21 terms of an immunity or given immunity against prosecution
22 and Judge Bianco will instruct you how to evaluate such
23 agreements and such testimony.

24 But in sum and substance, Tim Gaarn testified
25 that as a favor to Phil Kenner who had loaned him a lot of

Summation - Miskiewicz

5742

1 money over the years at a point in his life when he was
2 unable to pay his own bills, about to be foreclosed on on
3 his property in New Jersey, he agrees to become the person
4 who runs one of these subcompanies, Standard Advisors,
5 will take the stock owned by Standard Advisors in Eufora.

6 Why does he do it?

7 Kenner asked him to do it and he had done him
8 many favors in the past. Does he think on the stand that
9 he had committed a crime? That's for you to evaluate.

10 Certainly he testified here under the terms that
11 nothing he said could be used against him, but the bottom
12 line is what does he do?

13 Through Tim Gaarn, and remember he testified
14 that document that was dated 2005 when he has supposedly
15 inherited all the shares of Eufora was false. He actually
16 signed it just days before he opened the bank account in
17 Wachovia through which all this money flowed, and you saw
18 the bank records, that account opens late December of '08,
19 and that's when the money starts flowing.

20 First, right about this time, December 30, 2008,
21 the same date Gaarn is opening up his Wachovia account,
22 give or take, he may have opened it up December 31st, I
23 don't recall, but it is in evidence.

24 Constantine: Can you wire CMG a little dough?
25 It is negative 220 -- I think it is a fair inference from

Summation - Miskiewicz

5743

1 the way these men talked to each other and the financial
2 records when they say negative 220, they are not talking
3 \$220, they are talking \$220,000.

4 Now we know here that Mr. Kenner having been
5 very generous to Mr. Constantine is suddenly also running
6 into financial difficulties. Wells Fargo has pulled the
7 plug on me. And they go on.

8 What happens? 100,000 comes into Eufora from
9 Glen Murray and goes out, almost within -- well, within
10 two days through Gaarn. And from there look at the
11 nature -- and this is typical of so many of these
12 transactions -- some money goes directly to Kenner but
13 then some of it gets shifted back to CMG and it is all
14 used to pay Kenner expenses.

15 January 2009, Mr. Gaarn is two weeks on the job
16 of basically being the guy through which all the money
17 will get funneled.

18 Government's 7446, look at what -- this is a
19 fascinating text among many. Remember the shopping lists
20 that John Kaiser said Kenner had given him about where all
21 of his money was? Couldn't really give him a document,
22 couldn't give him a stock certificate, all he could give
23 him was a shopping list, basically handwritten notes.
24 Here's, you know, here's a text version of that. You can
25 see Kenner, you can almost read Kenner's frustration. 850

Summation - Miskiewicz

5744

1 for CMG, 17,000 for Avalon, 3350 for Hunter. These are
2 all debts that Constantine had and debts that Kenner
3 helped him get out of.

4 You can see, by the way, I submit to you, the
5 beginnings of the strain of this conspiracy, and there is
6 strain, never ends, and I'll get to that at the end,
7 doesn't end, but there is strain because now they are both
8 in trouble. This is January of 2009, the lines of credit
9 are about to be called in on default. He knows it, he has
10 all the records in his house (indicating). His back is up
11 against the wall.

12 Call me about Gonchar. Can you spot me some
13 travel food money?

14 They are dying for cash, they are running out of
15 cash, and that's why Mr. Gaarn is so helpful to these
16 co-conspirators, whether he thinks he's a co-conspirator
17 or not is for you to decide.

18 Count 2 which is a wire transfer that occurs,
19 this is a substantive charge, not part of the conspiracy,
20 but both Kenner and Constantine are charged with this on
21 February 12, 2009.

22 This is Count 2, and more specifically, if I can
23 use this, that is really Count 2. Money goes to Eufora to
24 Gaarn and then money goes to Kaiser. What did Kaiser tell
25 you about this? This is the point at which he's working

Summation - Miskiewicz

5745

1 on another project. Remember he talked about Hermosa
2 Beach, talked about a million dollars that supposedly went
3 to Hawaii, comes to find out it went somewhere else to
4 Mexico, doesn't get that money back. He works on the
5 Hermosa Beach, California. At the closing he doesn't see
6 anything but about \$300,000 from the profit of that.

7 Then there's another project in Scottsdale,
8 Arizona, and this is the point where he's running out of
9 his own cash and says I need money to complete this job,
10 Phil. And look at the way the money flows? It goes from
11 Gaarn to Kaiser and then Kaiser says I need -- Kaiser told
12 you that he was then, after he was given the money, he
13 immediately has to transfer it back to Kenner because
14 Kenner said, oh, something along the lines he needed it
15 back for whatever reason. That is Count 2.

16 The fact that Kaiser is in essence a victim here
17 and is sending the wire transfer back to Kenner, I submit
18 to you -- well, Judge Bianco will charge you on the law on
19 this, but in essence that is the wire transfer and it goes
20 from Gaarn to Kaiser's account here in the Eastern
21 District of New York which here you also have to find
22 venue and Judge Bianco will instruct you on that and what
23 the relative elements of that are. But that money, that
24 wire transfer comes back here, touches at least the
25 Eastern District of New York through John Kaiser's bank

Summation - Miskiewicz

5746

1 account here. It is part of a flow of money that
2 essentially is just ripping off Greg DeVries and Bill
3 Ranford, and follow the money further on because it is
4 relevant to the money laundering.

5 Kenner's expenses are paid but, you know, if you
6 were to track the various things that he spends money
7 there, you would go back and see it comes from Tim Gaarn,
8 doesn't look like it is related to Eufora. It's a
9 concealment. The same is true using a portion of it from
10 Kaiser, another concealment.

11 Count 3, a few days later, February 26, 2009.
12 Now it is Steve Rucchin's turn to get ripped off. First
13 the money goes to Eufora, then to Gaarn, it gets blasted
14 out in all directions but again I will submit to you that
15 this is where Count 2 comes in because the money then,
16 here it is in the Eastern District of New York, it is
17 Kaiser's account and then he's told, hey, John, told by
18 Kenner, I need that money back, and he does it. Kaiser is
19 not involved in ripping anybody off. The guy is a builder
20 and he's building a home that he's doing as part of
21 another deal, a legitimate house flip with Mr. Kenner.

22 Look at the overall picture. The only reason to
23 do this is to hide where the money is coming from and
24 where it is going.

25 Count 4, May 22, 2009, Bill Ranford's turn

Summation - Miskiewicz

5747

1 again, another \$100,000. By the way, do you remember
2 Ranford, it's 2009, he's a coach now. In his words in sum
3 and substance he said I'm not making NHL money at this
4 stage. Two wire transfers within a matter of weeks at a
5 point at which he's essentially retired now, he has to be
6 careful how he spends money and putting money in a company
7 that says Mr. Constantine says is not really worth much.
8 Of course Bill Ranford doesn't know that.

9 Who controlled Ranford's bank account? Kenner
10 did. Now, that line from Kenner down to that box on the
11 lower right-hand corner shows now this time Kenner is
12 sending money to Kaiser and it is his expenses. Again
13 Kaiser is building something, he's not involved in this,
14 but again the causing of that wire which again touches the
15 Eastern District of New York, that is Count 4.

16 Then we get to Nick Privitello, December 7,
17 2009, the day that Mr. Privitello has to go down in
18 history as a day that will live in infamy, his sense of
19 infamy, because as you recall he got nothing, and the
20 indictment charges as to Mr. Privitello's Eufora losses.
21 It's not just that the money was diverted but that he was
22 simply just disavowed. It's like they took his money and
23 they said what money?

24 The defendant knows about, both defendants know
25 about Privitello. Here they are again going back and

Summation - Miskiewicz

5748

1 forth. This is November 13, 2009, just before the
2 Privitello wire, right about the time that Eufora
3 allegedly got some sort of terrific deal with MetaBank and
4 it was going to be great. And what does Kenner say in
5 response? I'll yell MetaBank as I kick Nick in the balls.
6 Constantine says perfect. They knew about the discussion
7 how to sell Nick Privitello. Hey, MetaBank, and you heard
8 Privitello say about MetaBank, that was a big selling
9 point. Hey, Eufora will suddenly, you know, have this
10 access to all this capital now, except he gets nothing.

11 The Government's Exhibit 503.1, one of the
12 excerpts shows you how basically he's getting nothing but
13 lies.

14 (Audio clip played.)

15 MR. MISKIEWICZ: Mr. Constantine knows, he says
16 it right there, he knows how much money is coming in. So
17 in other words, he's saying, and you'll hear this later
18 about the Home Depot tape where he makes reference to the
19 \$700,000 that came through Tim Gaarn. Mr. Constantine is
20 saying right here to Privitello, he knows where all that
21 money came. He's using it as an excuse now yes can't give
22 Nick Privitello anything for his \$200,000, so he's using
23 it for his benefit in a completely different way, but he's
24 admitting I know where all that money was coming in.

25 The players, they sent their money to Eufora, I

Summation - Miskiewicz

5749

1 knew all about that. You, Nick, well, you know, you're
2 money went to Ron Richards. Listen to what he says here,
3 and by "here" I'm referring to Government's Exhibit 503.2.

4 (Audio clip played.)

5 MR. MISKIEWICZ: That's a nice entrepreneurial
6 way of saying what he just said: Fuck you, Nick, you're
7 never getting your money back, and he didn't.

8 Oh, you heard on cross-examination weren't you
9 part of a conference call where maybe somebody overheard
10 that somebody offered you your money back? And, oh, yes,
11 you heard testimony and cross-examination about, you know,
12 Nick Privitello didn't take his money back because it was
13 part and parcel of the Stolper, you know, it had some
14 ulterior motive, you heard stuff like that. Ask yourself,
15 common sense, does that make any sense when you hear the
16 man himself say fuck you, Nick, and your \$200,000.

17 He stole it and he has the audacity to tell this
18 man you're never getting it back.

19 (Audio clip played.)

20 MR. MISKIEWICZ: Total double-talk. Total
21 double-talk. We got your money but it went somewhere, but
22 somebody else was controlling it -- double-talk. And by
23 the way it is not simply Mr. Privitello's say so about
24 this e-mail on that tape. It is in evidence, Government's
25 Exhibit 208.1. He was told, and there are several e-mails

Summation - Miskiewicz

5750
1 but I'll show you one, just days before. You'll see other
2 e-mails where he is told where to send the money. And
3 through John Kaiser, Constantine says: John, per our
4 conversation please accept this e-mail as a confirmation
5 that upon our receipt of \$200,000 Eufora's members will
6 formally execute a membership transfer consent form and
7 amend the company's operating agreement to reflect a 1.5
8 percent interest in Eufora LLC which shall be held by Nick
9 Privitello.

10 That's exactly what Privitello is saying to him
11 on that recording and exactly in response to which you
12 heard what Mr. Constantine said and I'll not repeat it.
13 I've said it out loud and I apologize for saying it but it
14 is in evidence. You know, I'll not sugar coat it,
15 consider the words used by this man to an investor. I
16 didn't say it; he says it to him.

17 There it is. Count 5 and 6, Privitello,
18 December 7, '09, \$200,000, it is listed as \$200,000, if
19 you recall there were two wires of 150,000, and then
20 50,000 because Mr. Privitello had to do it that way to get
21 out of two different accounts or whatever he said. That's
22 why it is split up into both Counts 5 and 6. Goes to the
23 law offices of Ron Richards, goes to AZ Avalon, it's
24 spent, you know, with essentially that \$150,000 is spent
25 immediately for Eufora purposes.

Summation - Miskiewicz

5751

1 It is also some of it is spent again for the
2 race car lawsuit for Tommy Constantine, that's Patrick
3 Gonyajr of Carey Rodriguez Greenberg and Paul, \$15,000 you
4 heard was about, had nothing to do with Eufora. So both a
5 diversion for benefitting for Mr. Constantine's personal
6 debts but also for Eufora.

7 And what does Mr. Privitello get out of it?

8 Nothing. Nothing. To this day nothing.

9 Let's move to the Global Settlement Fund.

10 Again, recall the testimony that you heard from a number
11 of the hockey players who said the purpose of the Global
12 Settlement Fund was mainly to find Ken Jowdy, he's going
13 to be the fall guy for Kenner and Constantine. Jowdy got
14 all your money, so we'll sue him, and therein begins the
15 creation, you can imagine the wheels working at this
16 point. It's all Jowdy's fault. Of course the players
17 have no idea at this stage that Phil Kenner is partners
18 with Ken Jowdy and got to be a partner after sending Ken
19 Jowdy millions, nor do they know anything about the
20 millions that Tommy Constantine got out of the Hawaii
21 diversion through Urban Expansion and other transactions,
22 but we'll go after Ken Jowdy.

23 In sum and substance, the money goes to Ron
24 Richards's escrow account, among other documents that
25 you'll have to look at as Government's Exhibit 1101.

Summation - Miskiewicz

5752

1 Let's skip that.

2 Approximately 2.9 million is raised through the
3 various hockey players. There's an additional sum of
4 money from Sergei Gonchar. I don't know what to tell you
5 about Sergei Gonchar other than he's happy about what ever
6 Mr. Semple said, just don't tell his wife about it with
7 Playboy. The 2.9 million from other hockey players of
8 which \$225,000 goes to the Jowdy legal expenses, that's
9 it. Everything else, including Sergei Gonchar, 4 million,
10 go basically to Kenner and Constantine expenses,
11 including, you know, getting an interest in the Mosquito
12 Rojo Tequila Company (indicating), and they find the
13 agents testify they find a business card, Phil Kenner is
14 the chairperson of this company, but no, no, no, I never
15 possessed, it was never any manufacturing, there was never
16 anything. Show him the e-mails that he sent to John
17 Kaiser. Hey, here are the new Russian bottles, whatever
18 that is. I don't know what to make of that testimony,
19 photo shop?

20 Finally, after I produced the bottle
21 (indicating) and I don't know, I guess it's not a real
22 bottle. You can have it. You can touch it. It's a real
23 bottle.

24 Again including Sergei Gonchar, oh, I'm okay,
25 don't worry about it. That's what went to Jowdy,

Summation - Miskiewicz

5753

1 litigation expenses.

2 Remember of those litigation expenses, one case
3 was dismissed and John Kaiser testified that he was told
4 by the defendant himself, Mr. Kenner, that it was
5 dismissed because of a forgery. You have to evaluate
6 Mr. Kaiser's credibility on that. He did tell you that,
7 you know, he was best friends, he was a close friend and
8 then after time hit the very end, he ruined my life.

9 That's legitimate, you must evaluate his bias and his
10 anger, his anger. I submit there is a difference between
11 biased and lying and being biased because you are angry
12 because you've been defrauded for years by one man.

13 And what about, you know, there are many
14 versions of this. This is Government's Exhibit 757, and
15 you heard about, you heard during cross-examination this
16 e-mail from Phil Kenner to various hockey player investors
17 in GSF. This 1757 happened to go to Mike and Kristin Peca
18 basically getting their acknowledgment. What Peca said to
19 a greater or lesser degree, all the hockey players said
20 when they were pitched face-to-face by Kenner and
21 Constantine (indicating) in their homes, the principal,
22 you know, with all of these hockey player victims came
23 away with, the principal goal here was to go get Ken
24 Jowdy, and the money goes. They send their money. It is
25 only after the money is gone that this hall of mirrors

Summation - Miskiewicz

5754

1 erupts (indicating).

2 Oh, by the way, per our conversation please
3 acknowledge -- you know, through cross-examination you
4 must have heard this e-mail a dozen times again and again
5 and again. I'll come back to this in a minute, but you
6 know from the texts or you will see from the texts that
7 all those special or those additional interests, those
8 valuable considerations that you are now getting, now that
9 we got your money to go fight Ken Jowdy, you will get
10 other things. You know from the texts that both Kenner
11 and Constantine are discussing the problems with these
12 significant, so-called, significant assets.

13 I'll not read every single one again but go
14 through them, 7427, talking about the problems with
15 Avalon. 7403, talking about what are we going to do with
16 the Falcon monthly payments, this is '08, almost a year
17 before GSF. It goes on and on, significant assets, there
18 basically is no significant assets as you came to find out
19 and it took a long time to get there. There were no
20 significant assets.

21 The Palms condos, gone. The planes, they were
22 resold to other people. Hockey player money used
23 basically to get Kenner out of his personal guarantee on
24 the planes. Time and time again, this please acknowledge
25 letter, you came to find out over the subsequent months or

Summation - Miskiewicz

5755

1 weeks, none of it really added up to anything. So again I
2 would submit to you you can consider whatever they put in
3 there was again pure theft. Those transfers that went
4 into GSF represented pure profit for the players, minus
5 225,000 that was spent in litigation costs for Ken Jowdy,
6 pure profit for purposes of the money laundering
7 conspiracy.

8 I mean even the plane. Do you remember the
9 plane that Joe Juneau gets, the Cessna, that Joe Juneau,
10 he's one of the bad apples according to one of the
11 e-mails, Joe Juneau, Ethan Moreau, Owen Nolan. He didn't
12 want it. Page 195, he didn't want the plane, and when
13 asked what he got out of his investment in the Airpark, he
14 says at 195.

15 Question: And then the only money you got out
16 of it was an airplane?

17 Answer: Well, yeah, the airplane is what I got
18 out of, the Airpark deal.

19 And then you have to go to Eric Edenholm, Tommy
20 Constantine's friend.

21 Constantine is about to lose his house because
22 he's so broke. No shame in that, but what does he do? He
23 engineers this deal whereby basically they -- Eric
24 Edenholm has a plane, and the testimony is in evidence,
25 I'll not summarize it for you, you can go back and read it

Summation - Miskiewicz

5756

1 or ask for a read-back. But basically what it comes down
2 to is to save Constantine from being evicted, shovel his
3 plane to Joe Juneau, and Constantine takes 400 -- over
4 \$450,000 from the Global Settlement Fund so that Edenholm
5 can buy Tommy's house out of foreclosure and keep Tommy
6 from getting convicted -- evicted.

7 Government's Exhibit 3053 is what I'm showing
8 you now, that is the wire transfers that show that crooked
9 deal that had nothing to do with anything any of the
10 players were told about the Global Settlement Fund.

11 I'll come back to the Global Settlement Fund and
12 particularly this, but before it gets much later, let me
13 wrap up here. I've talked to you about the wire transfers
14 and their significance with respect to the money
15 laundering and also the wire fraud and the Hawaii GSF and
16 Eufora aspects of the conspiracy and that both defendants
17 are charged with that.

18 Count 7 and 8, though, just remember is a
19 stand-alone sort of set of counts. It only charges the
20 defendant Kenner. But recall what this is. We're now
21 going back in time a bit here to 2006 when the Hawaii
22 fraud is still, it's going strong, lines of credits are
23 being indebted like crazy, and John Kaiser and other
24 partners of his have a house in Sag Harbor, they've bought
25 it, they've bought it months or years earlier, it is under

Summation - Miskiewicz

5757

1 a different name of an LLC, North Point Properties, and
2 Kenner finds out about it. He finds out that one of the
3 John Kaiser's partners wants out, and so he engineers a
4 deal.

5 Like so much of everything else that you've seen
6 in this trial, he engineers a deal whereby he gets
7 property, this Sag Harbor property for putting no money
8 down, but basically stealing it from Michael Peca.

9 He creates the Led Better Development Company,
10 and again not to use the phrase too many times, but common
11 sense would say well, if three out of the four people will
12 continue owning this property and all we'll do is bring in
13 one person, why create a new owner, Led Better? Kaiser
14 said it made no sense. We'll have to pay transfer taxes.
15 Kenner didn't care. It's not his money any way. So he
16 creates the Led Better Development Company into which the
17 property is now going to be sold, more taxes to Suffolk
18 County, and contrary to what Brian Berard is told, he's
19 told I'll be 50 percent owner with Kaiser and whoever else
20 is the remaining partner, there's the operating agreement.
21 Phil Kenner is suddenly a 25 percent owner.

22 And where did he get the money? He got the
23 money by drawing down \$395,000 out of Michael Peca's line
24 of credit, just pure theft, and a wire transfer and a wire
25 transfer that touched and affected the Eastern District of

Summation - Miskiewicz

5758

1 New York because this is where the closing was, and it is
2 just pure theft.

3 You know, if you look at among other things
4 Government's Exhibit 2001, the loan transaction history
5 for Michael Peca's line of credit, you will see the money
6 go out and you saw the closing documents and you heard
7 Mr. Betesh testify. And by the way those loan transaction
8 reports, do you remember Kristin Peca's recorded
9 conversation with the defendant early on in the trial?
10 She is trying to find out what happened to our money?
11 Where did it go? How can I trace the records? And Kenner
12 says to her, I don't have them, trace it all, go to
13 Northern Trust, trace it all. He said, follow it all.

14 Government's Exhibit 5103-L, the loan
15 transaction histories. Where were they? In his house.
16 He lied to her. I don't have any records. Well, he lied
17 to Bill Ranford.

18 Why would Ranford who is just trying to get a
19 handle on where his money is, why would he come up with a
20 story like I asked him where the records are and he told
21 me his laptop or his hard drive had crashed, just weeks
22 before his as? And you know that was false, but Kenner
23 had a different version of that event, but I'll leave it
24 to you. You have to make the determination who to
25 believe.

Summation - Miskiewicz

5759

1 So Led Better, very simple, \$395,000 comes out
2 of Peca's account and I will submit to you this. Look at
3 that. It goes from one holding company to another holding
4 company and then to a third holding company, all of which
5 Phil Kenner controlled. What is that about other than a
6 series of financial transactions to launder stolen money
7 and conceal where it came from?

8 And Mr. Berard similarly is also another victim
9 of this because he's also putting up \$375,000 to buy his
10 half of the interest. And as the money flows, again, it
11 all is to the benefit of Mr. Kenner. Nobody else
12 benefited from this. And when Michael Peca was asked on
13 the stand at the beginning of the trial, do you remember
14 there was a cross-examination and testimony that, you
15 know, Michael Peca in his grand jury appearance suggested
16 maybe he had heard about the Jowdy loan? He also
17 testified he was very upset or concerned about it because
18 he wasn't -- read his testimony about what he said about
19 what he really specifically recalled and when he learned
20 about, you know, money going to Jowdy.

21 Remember he's testifying in 2011. Jowdy is out
22 there. Jowdy is the bad guy in 2011, so it's not
23 particularly surprising, and I submit you can go down that
24 rabbit hole if you want but it will not get you very far
25 because by 2011 Jowdy is the bad guy and Michael Peca has

Summation - Miskiewicz

5760

1 been told he's the bad guy, okay, but on the stand, in
2 this courtroom, he was shown that line of credit
3 transaction and asked, and on or about this date, July of
4 2012, this is when he's recording Kenner and saying I
5 never would have put my money in Hawaii -- I mean in
6 Mexico. I never would have done that. He's now a year
7 after the grand jury appearance confronting Kenner. I
8 never would have done that. He's asked: On or about that
9 day when you were making this recording, had you seen that
10 \$395,000 wire that we talked about earlier this morning to
11 something called Led Better?

12 Answer: I had not.

13 Question: Did you have any knowledge of it?

14 Answer: I do not. "

15 I can't end with any sort of soaring rhetoric
16 because you've guys have been very serious and attentive
17 to the facts here, but there are certain things I want to
18 just leave with you with respect to the fact that this is
19 not only a conspiracy that began in '03 or '04 with
20 Hawaii, but it is one that continued right up through the
21 2013 date set forth in the indictment.

22 Do you remember Tyson Nash who e-mailed Kenner,
23 and the e-mail came in relatively late, about the same
24 time as the Stolper lawsuit? The Stolper lawsuit which is
25 one of those things that go nowhere, this time it is about

Summation - Miskiewicz

5761

1 Eufora, hostile takeover, whatever. And, again, Mr. Nash
2 at about that same time is asking, can you give me
3 records, Phil? And what does he respond? He says in sum
4 and substance, find me the rat. And you know Sergei
5 Gonchar is feeding information back to the person, the
6 co-conspirator Tommy Constantine, so he knows information
7 about what is going on.

8 You heard from Mr. Gonchar, he wore his iPhone
9 and kept his iPhone on during a meeting in New York. Find
10 me the rat. Mr. Nash wants records, he wants an
11 explanation where his money is and Mr. Kenner, all he can
12 think of is saying find me the rat.

13 Now we know, you know, who the rat was in that
14 Stolper meeting. Maybe now Mr. Nash will get his records.

15 You heard through the defendant the testimony
16 that that whole Sag Harbor Led Better thing, that was
17 Manfredi, Kaiser, extorting. They didn't want to close on
18 the Lehman deal so Kaiser wanted some kind of a short term
19 \$400,000 loan. It goes on and on and on. You know, try
20 to read the testimony and see if it makes any sense to
21 you.

22 Again you can follow the rabbit hole and it will
23 lead you nowhere or you can stick to the facts of the
24 misrepresentations and the elements of the fraud charge
25 and it will, I think, bring you to what really happened.

Summation - Miskiewicz

5762

1 He says he did this \$400,000 transaction back
2 and forth because of this extorted \$400,000 short term
3 loan because, you know, Kaiser didn't have any money and
4 he wanted money and that's yes had to borrow or whatever.
5 I don't know even if he said borrow from Michael Peca that
6 395. I submit to you whether that is true or not is
7 immaterial.

8 Peca is the victim in Sag Harbor. He's the guy
9 who is, you know, got his line of credit stolen from and
10 got nothing for it. He's not even on the operating
11 agreement, even if you want to believe that rabbit hole of
12 lies regarding the short term loan. But again in terms of
13 evaluating the truthfulness of that contention, remember
14 on cross-examination Mr. Kenner said, you know, in sum and
15 substance, that he was giving money to Mr. Kaiser at that
16 same time, but then he was confronted with testimony that
17 covered that same period of time in another piece of
18 litigation and he was asked about a prior inconsistent
19 statement, and Judge Bianco will also charge you how to
20 consider prior inconsistent statements and the credibility
21 of witnesses.

22 In that prior deposition, Kenner said it wasn't
23 Kaiser who owed him money, it was Kenner who owed Kaiser
24 money. In fact so much money that he lost one of his
25 companies to Kaiser, Baja Development Company. And then

Summation - Miskiewicz

5763

1 on recross and whatever, he said, no, I didn't say Baja, I
2 meant something else.

3 Again you can follow that rabbit hole, whether
4 it was Baja Ventures or Hawaii Ventures, the bottom line
5 is he said two different things at two different times
6 about the same event. One day Kaiser owes him money,
7 400,000, the next day or his prior statement was, no, I
8 was so indebted I went into default, I had to give him one
9 of my companies. It makes no sense. It's a total lie.

10 And by the way, whose fault is it? The mirror
11 of lies here is it Ken Jowdy's fault, Kaiser's fault, it's
12 the bad apples, it's the FBI.

13 What did he say when confronted with his prior
14 inconsistent statement? Oh, I didn't say it, it's the
15 poor court reporter's fault. Really, is that how far
16 we'll go to find reasonable doubt that this man is just a
17 fraudster?

18 You don't need too much more than that Home
19 Depot tape which came in again late in the trial. I'll
20 not play it for you. There's so much there and you all
21 want to go to lunch, I know, but listen to what he says
22 about, you know, Constantine saying, you think they're
23 only a pinch, the getaway car driver not the guy who stuck
24 up the bank or words to that effect? You know, you will
25 burn the house down. The FBI is all over the place.

Summation - Miskiewicz

5764

1 It goes on. It's Government's Exhibit 4500. He
2 makes reference to that Tim Gaarn, those substantive
3 counts, how will it look when that \$700,000 goes back and
4 forth? And Constantine, what does he say? I have
5 explanations, I got paper, whatever he says. You have to
6 rely on the actual exhibit. Basically I got a story for
7 everything. And what happens? The whole purpose of that
8 is, the whole purpose of Mr. Constantine's plea in that
9 conversation is to send word to the people in New York,
10 Stolper, lay off, stop, stop, stop. The word "stop" must
11 have been 100 times in Government's Exhibit 4500. And you
12 saw the e-mail and Mr. Kenner saying your message has been
13 conveyed.

14 Did anything come out of that Stolper lawsuit?
15 Mr. Privitello have his stock certificate? No. He got,
16 you know, an "FU," that's all he got. And all those other
17 players whose money just flowed through the Wachovia
18 account, they got nothing. That conversation, and granted
19 it is mostly Constantine talking, you know, I submit to
20 you couldn't be stronger evidence of the fact that on that
21 day of that August of 2010, the conspiracy was alive and
22 well again. Just continue.

23 Your message has been conveyed, Stolper goes
24 nowhere, it is all, you know, don't worry about it.

25 A personal story: I in law school was addicted

Summation - Miskiewicz

5765

1 to watching infomercials late at night when I couldn't
2 fall asleep. My favorite was the late great Billy Mazer,
3 who back in the day sold mostly OxiClean which I never
4 heard of and now you can find it all over the place but
5 back then you couldn't find it. I was enthralled by this
6 pitchman's ability to, in an entertaining fashion, get you
7 to believe you should buy this product. And you know for
8 awhile I had plenty of that junk in my house. I got a
9 Pocket Fisherman. I don't have a Veg-O-Matic -- I wish I
10 did.

11 You heard the cross-examination of this, please
12 acknowledge the Global Settlement Fund money again and
13 again. You know what went on in my mind every time when I
14 heard the reading of this. But if you were to order and
15 you order right now within the next 15 minutes, and not
16 only that but we'll not send you not one, we'll send you
17 two. That's what this is (crumbling document). The only
18 difference is when Billy Mazer said he will send you the
19 two buckets of OxiClean, you got the two buckets. These
20 guys, hockey players, John Kaiser, Ethel Kaiser, everyone,
21 they got nothing, and I submit to you that proves beyond a
22 reasonable doubt that they are guilty of each and every
23 count of this indictment and I ask you to find them
24 guilty.

25 Thank you for your attention.

Summation - Miskiewicz

5766

1 THE COURT: Okay. Members of the jury, it's
2 105. We'll restart at 2 o'clock with the summations.

3 Do not discuss the case. Have a good lunch.

4 (Whereupon, at this time the jury exits the
5 courtroom.)

6 THE COURT: Please be seated. I just want to
7 put something on the record. My intern mentioned during
8 the break this morning she rode up in the elevator with
9 one of the jurors and said how is it going? They said
10 they are getting along fine, celebrated a baby shower, and
11 they are getting along fine, so it was an innocuous
12 conversation. The intern sits the back of courtroom every
13 day so I guess she works for me in some capacity. But I
14 instruct the interns they should follow the rules you
15 should follow, no conversation, no matter how innocuous.

16 Any objection to that?

17 MR. MISKIEWICZ: No, your Honor.

18 MR. LARUSSO: No, your Honor.

19 MR. HALEY: No, sir.

20 THE COURT: Mr. Haley, 2 o'clock.

21 MR. HALEY: Yes, sir.

22 THE COURT: Have a good lunch.

23 (Whereupon, an afternoon recess was taken.)

24

25

Summation - Haley

5767

1 A F T E R N O O N S E S S I O N

2 2 pm

3

4 THE COURT: Ready to go, Mr. Haley?

5 MR. HALEY: Yes, your Honor.

6 (The following ensued in the presence of the
7 jury.)

8 THE COURT: Everyone, please be seated.

9 Members of the jury, you will now hear from
10 counsel for Mr. Kenner, Mr. Haley's summation.

11 Mr. Haley.

12 SUMMATION FOR DEFENSE

13 MR. HALEY: After eight and a half weeks of
14 trial and the conclusion of the government's summation,
15 Phil Kenner as he stands next to me is presumed innocent.

16 And that principle, ladies and gentlemen, is the
17 life blood of our Constitution. And that principle, along
18 with your presence here and your role in this trial, was
19 designed by the framers of our Constitution to ensure that
20 the awesome power possessed by our government is equalized
21 when our government prosecutes one of us.

22 It is fitting, if not prophetic, that this case,
23 this particular case, is coming to a conclusion on the eve
24 of the Fourth of July and you will be deliberating in this
25 case following the Fourth of July.

Summation - Haley

5768

1 Well, where do we begin?

2 Conceptually, we begin where we started. And as
3 I told you in the opening statement and as Judge Bianco
4 told you in his initial instructions, Phil Kenner is the
5 accused. It is the government's case that is on trial
6 because the government bears the burden to prove its case
7 beyond a reasonable doubt on each and every element of the
8 offense charged for each and every charge in that
9 indictment. Nine counts.

10 Now, with reference to the burden of proof, one
11 of those fundamental elements is whether or not the
12 government has proven beyond a reasonable doubt that Phil
13 Kenner's actions were part of an artifice or scheme to
14 defraud or were they part of an effort to further the
15 investment objectives of his clients in what everyone has
16 acknowledged were risky investments, particularly in the
17 Hawaii land development, but with the great potential for
18 profit should those very real estate investments come
19 to fruition.

20 Now, in the opening statement, where I had the
21 privilege to address you on May 4 for the first time, I
22 said this to you.

23 *I make you this promise in conclusion. I will*
24 *do all that I can to elicit all the information through*
25 *the questioning of witnesses, as well as present evidence*

Summation - Haley

5769

1 *to you through my own client and others, so that you will*
2 *have the opportunity to make a determination on a full set*
3 *of facts as relates to whether or not the government has*
4 *proven its case beyond a reasonable doubt in terms of the*
5 *alleged crimes set forth in the indictment.*

6 That was my promise to you. The government made
7 you no such promise in their opening statement, for if
8 they did, they broke that promise.

9 I will also say, for purposes of my remarks to
10 you during the course of this summation, I will not raise
11 my voice. I will not use emotive terms like ripping off,
12 blasted out, rappole. I will not crunch papers in front
13 of you. I will do everything I can to appeal to your
14 collective judgment, intellect, without using highly
15 emotive terms.

16 But I will say this, ladies and gentlemen. That
17 dripping sarcasm by an attorney employed by the United
18 States Department of Justice in his summation to you is
19 not proof beyond a reasonable doubt.

20 Now, you may recall in my opening statement to
21 you I said as this case unfolds, longer than the five
22 weeks we anticipated, that some of the issues that will
23 arise in this case as part of the defense will include:

24 How did the FBI come to target Phil Kenner for a
25 criminal investigation in the first instance?

Summation - Haley

5770

1 What was their motive?

2 Did the FBI, during the course of this
3 in-excess-of-six-year investigation, deliberately ignore
4 evidence in their possession, favorable evidence that may
5 or would demonstrate this Phil Kenner committed no crimes
6 or that Phil Kenner was not a coconspirator with anyone?

7 Did the FBI coach and control witnesses to help
8 orchestrate these criminal charges?

9 Did the government give sweetheart deals, as
10 alluded to in the opening statement of the government?
11 And we will be talking about the deal that was given to
12 Tim Gaarn before I finish this summation.

13 And did the government ignore the crimes and
14 misdeeds of others in order to orchestrate the charge
15 against Phil Kenner?

16 Those are some of the issues. But what is now
17 more disturbing since the trial commenced and up to this
18 very moment: In its quest to convict Phil Kenner, did the
19 government allow and even encourage perjured testimony
20 from some of its witnesses?

21 There is, ladies and gentlemen, a document known
22 as Phil Kenner 43. It is this document. And this may be
23 the most singularly important defense document in this
24 case.

25 And it is the only time I will use that device

Summation - Haley

5771

1 over there. If I can use it efficiently, you will be able
2 to view what is on this document.

John Kaiser was a central government witness.

4 As a matter of fact, by my count he was mentioned during
5 the government's summation no less than 19 times. At some
6 point I lost count. Maybe it was more. Maybe it was
7 less. The government will have an opportunity in its
8 rebuttal to look at my arithmetic.

9 Listening to the government's summation, one
10 would think that John Kaiser was the sole victim of what
11 the government alleges to be the multiple frauds. They
12 did have occasion to mention, let's say, the Ranford,
13 Steve Rucchin, I don't even recall if Darryl Sydor was
14 mentioned, but John Kaiser was mentioned.

15 Now, we know who John Kaiser is. John Kaiser is
16 currently employed by Ken Jowdy as his director of
17 construction. We know, as the government elicited from
18 John Kaiser, that though he has no degree in architecture,
19 though he has no civil engineering degree, he does have
20 experience in construction.

21 We know from his testimony that he did at one
22 point in time build a White Castle restaurant. As a
23 matter of fact the government mentioned in summation that
24 he is a builder. He built that White Castle restaurant
25 from ground to roof.

Summation - Haley

5772

1 We do know from Brian Berard there is no plan to
2 build any White Castle restaurant at Diamanté San Lucas.

3 We know that John Kaiser, as brought out by the
4 government in its direct case, is a retired New York City
5 police officer, Suffolk County Police officer, retired
6 from the job on a disability pension as a result of neck
7 and back injury. And indeed, any of our public servants
8 are entitled to disability pensions should they injured in
9 the line of duty. No question about that, ladies and
10 gentlemen.

11 And we know that John Kaiser, by all appearances
12 his injuries have pretty much resolved themselves because
13 we heard testimony that when he visiting Hawaii they would
14 cover the land, look at the land they were purchasing,
15 step over cattle fences, things of that nature.

16 We know that now as a builder he is involved in
17 vertical construction. That means going up and down. Why
18 is that relevant? I do not mean to be sarcastic, ladies
19 and gentlemen, but when the government puts in front you a
20 witness to suggest that that witness has believability
21 because of his public service, and when the government
22 puts in front of you a witness and says the public service
23 included injury on the job by which he is now disabled,
24 well, let's talk about Kenner Exhibit 43.

25 During the course of his testimony, John Kaiser

Summation - Haley

5773

1 was asked by me on cross-examination.

2 *Question: Mr. Kaiser, isn't it true that when*
3 *you were interviewed by Special Agent Scott Romanowski and*
4 *Special Agent Matt Galioto with the FBI on October 19,*
5 *2010, at 11 am, you told the agents that you met Jowdy*
6 *twice in New York City, and at a second meeting at a bar*
7 *in New York City you discussed with him Hawaii and the*
8 *lending of money in Hawaii to Mexico. Isn't that true?*

9 *Answer: No.*

10 *You did not tell the FBI agents what I just*
11 *related?*

12 *Answer: That's correct.*

13 *Question: Isn't it true, Mr. Kaiser, during an*
14 *interview with the FBI on October 19, 2010, 11 am,*
15 *specifically Scott Romanowski and Matt Galioto, that you*
16 *told them that you saw Ken Jowdy in Mexico a couple of*
17 *times and discussed with Ken Jowdy you wanted to borrow*
18 *money from Hawaii to Mexico and would pay it back after*
19 *the closing?*

20 *Answer: No.*

21 *Isn't true, sir, that on October 19, 11 am,*
22 *interview conducted by Scott Romanowski and Matt Galioto*
23 *of the Federal Bureau of Investigation you told them that*
24 *Ken Jowdy brought up money .. Ken Jowdy brought up*
25 *borrowing money from Hawaii projects, borrowed millions,*

Summation - Haley

5774

1 *five to six million from the Hawaii project, there was*
2 *first going to be hundreds of thousands, not millions, and*
3 *that Ken Jowdy was not happy that the money amount started*
4 *to grow to millions after money to Mexico?*

5 Answer: No.

6 Let's take a look at Kenner Exhibit 43. This is
7 in evidence.

8 Kenner Exhibit 43, October 19, 2010, 11 am.

9 Scott R, I suggest to you that that is Scott Romanowski,
10 Matt G, I suggest to you that that's Matt Galioto of the
11 FBI, and John Kaiser.

12 These are as admitted into evidence, ladies and
13 gentlemen, the notes of that telephonic interview.

14 JK, I'm going to suggest you to you that's John
15 Kaiser, met Jowdy -- twice in New York City in New York
16 City -- trust 2003 -- Jowdy restaurant discussed,
17 discussed project in Hawaii, funding in Mexico.

18 There at, it says PK, KJ with girl. I'm going
19 to suggest to you that a fair interpretation of the those
20 notes is that when that meeting takes place, Phil Kenner
21 was present and Ken Jowdy was with a girl.

22 Second time. Another time at a bar in New York
23 City. R discussed Hawaii. Lending, looks to me like a
24 dollar sign, from Hawaii to Mexico.

25 We have KJ, Ken Jowdy, JK, John Kaiser.

Summation - Haley

5775

1 JK: Not sure how Ken Jowdy and circle,
2 uncertain who those initials are, met.

3 Next line. JK, John Kaiser, saw KJ, Ken Jowdy,
4 in Mexico a couple of times. Again discussed KJ continued
5 to borrow, looks like a dollar sign to me, from Hawaii to
6 Mexico with payback after closing.

7 Do you remember Phil Kenner testified that there
8 was a deal that Ken Jowdy would pay back the money that
9 was loaned from the Hawaii land develop to his Mexican
10 project after the closing of Lehman and it didn't happen?

11 They were hoping that this relationship with Ken
12 Jowdy would come to fruition after the Lehman closing and
13 they would get paid back. There was no reason in all
14 those documents that the government points to, saying:
15 Ah, Ken Jowdy is there. They are not advising anyone that
16 there is an unpaid loan. At this point in time there was
17 still the hope that Ken Jowdy would make good on the loan
18 that came out of Hawaii to Mexico.

19 Next page. KJ, Ken Jowdy. I suggest KJ is Ken
20 Jowdy, ladies and gentlemen, but it is your
21 interpretation, brought up borrowing dollar sign from
22 Hawaii project. Borrowed millions, point five to six
23 million, from Hawaii project.

24 First going to be hundreds, Ks, not millions.

25 JK: Not happy dollar amount started to grow to

Summation - Haley

5776

1 millions of dollars to Mexico.

2 Discussed Brian Berard, PK, was agreement to
3 borrow money from Hawaii.

4 Again, Ken Jowdy to JK.

5 Ken Jowdy: Don't worry. It will all come back.
6 Get repaid in New York City. Discussed money from Hawaii
7 to Mexico just to be used for Mexico.

8 Now, this document, Kenner Exhibit 43, was in
9 the possession of the government. It is their document.
10 They created the document. It was in the possession of
11 the government when John Kaiser answered those questions
12 under oath. And everyone at that table, the prosecution
13 table, remained silent.

14 Well, it was addressed by the government when
15 they conducted the redirect of Ken Jowdy.

16 *Question: Now, were you asked last week a*
17 *series -- withdrawn. Very quickly.*

18 *Were you asked, really by both Mr. Haley and*
19 *Mr. LaRusso, a series of questions about some notes of an*
20 *interview? I'm going to show you the notes that were*
21 *shown to you, 3500JK1.*

22 This is 3500JK1. Ladies and gentlemen, you will
23 have the opportunity to look at this when you deliberate.
24 You will have the opportunity to look at each and every
25 document by both defense as well as the government. But

Summation - Haley

5777

1 the defense documents will be available for review as
2 well. I am not going to spend all the time going over the
3 defense documents here but you will have that opportunity.

4 But this JK1 is central because it sets the tone
5 to what the government and how the government presented
6 its case to you. So let's continue.

7 Now, you were also asked last week a series,
8 withdrawn, very quickly, you were asked really by both Mr.
9 Haley and Mr. LaRusso a series of questions about some
10 notes of an interview.

11 I'm going to show you the notes that were shown,
12 3500JK1.

13 *Question: In that time frame, roughly October
14 2010, you were asked by Mr. Haley and also Mr. LaRusso, a
15 series of questions, did you tell the FBI X, Y and Z?*

16 *Do you remember those questions?*

17 *Answer: Yes, I do. Mr. Haley wanted to know
18 did you have a conversation or did you tell the FBI that
19 you had a conversation with Ken Jowdy about Ken Jowdy
20 bringing money from Hawaii?*

21 *Do you remember that question?*

22 Yes.

23 *Now, you said you don't recall, you didn't --
24 you never saw those notes.*

25 *Answer: I never saw those notes.*

Summation - Haley

5778

1 *Question: In or about the time frame that you*
2 *were talking to the FBI, did you tell them about what*
3 *Mr. Jowdy told you or what other people were telling you*
4 *about Ken Jowdy?*

5 *Answer: What Mr. Kenner was telling me about*
6 *Ken Jowdy.*

7 Is that consistent with what you saw in these
8 notes?

9 Did Phil Kenner say: Look, when you get
10 interviewed by the FBI, you have to give them all this
11 kind of detail. You have to tell them that Ken Jowdy was
12 with a girl in the first meeting. You have to tell them
13 that at the second meetings you discussed Hawaii. You
14 have to tell them

15 Ladies and gentlemen, I think the document, in
16 terms of its detail, suggests to you these are notes of an
17 interview conducted by agents of the Federal Bureau of
18 Investigation of John Kaiser where he described at that
19 point in time, before he became an employee of Ken Jowdy
20 and Diamanté Cabo San Lucas, wherein he and Ken Jowdy are
21 having a discussion about the Hawaii loan, which is
22 central to this case, and to feed up the question: Well,
23 whatever I told the FBI on that day I did not know of my
24 own personal knowledge but was told to me by Phil Kenner.

25 How often during the course of the trial did you

Summation - Haley

5779

1 hear a government witness say the that? Well, I didn't
2 know of my own personal knowledge. It was told to me by
3 Phil Kenner?

4 And I really don't mean to be facetious, ladies
5 and gentlemen, but at times it was if you could ask the
6 government witness what day of the week it is, and they
7 would say well, it is Thursday, and I know it's Thursday
8 because Phil Kenner told me it's Thursday, and Phil Kenner
9 is my trusted financial advisor.

10 It was a theme that they played time and time
11 again to you, to suggest that their witnesses had no
12 ability to have any understanding of any of their finances
13 unless Phil Kenner told them what it was or advised them
14 as to the nature and extent of that investment.

15 You know, from my perspective, I'm not going to
16 tell you a personal story about a hockey player or
17 anything of that nature, but from my perspective I should
18 be able to sit down right now. I should be able to say:
19 The way the government presented this case to you, to
20 allow testimony of that type and nature to be put before
21 you when they know it was wholly inconsistent with an
22 interview of John Kaiser that was conducted on October 19,
23 2010, ought to say to you we cannot in good conscience
24 base a verdict of guilty against a fellow citizen. It
25 happened here in an American courtroom in front of you.

Summation - Haley

5780

1 Now, there is one, ladies and gentlemen, and as
2 an obligation to my client and, from my perspective, my
3 obligation to you, let's talk about other instances where
4 the government, at a bare minimum, ignored documents in
5 their possession and put a witness on the stand without,
6 by all appearances, before they put that witness on the
7 stand having any interview by which the witness may say
8 something to them and say: Well, wait a minute, you tell
9 us that but there is a document that suggests otherwise.
10 They didn't do that. And actually, it happened with Bill
11 Ranford.

12 Now, we know that Bill Ranford testified quite
13 directly that he was unaware of his money coming out of
14 his Schwab account, \$100,000, on February 6, 2009, being
15 moved from account, pursuant to the power of attorney that
16 Phil Kenner possessed, from his Schwab account to Eufora,
17 where indeed it was then, after it went to Eufora, placed
18 into the account of Tim Gaarn, and then Tim Gaarn made
19 payments out of that account to Phil Kenner. We don't
20 dispute that those bank records exist.

21 So he said no, I was unaware of that on February
22 9, 2009. He also said he was unaware of the transfer from
23 his account in the amount of \$100,000 on May 4, 2009. And
24 the testimony speaks for itself.

25 *I knew nothing about this money.*

Summation - Haley

5781

1 *When was the first time you saw this document?*

2 Referring to the Schwab documents whereby Phil Kenner,
3 utilizing the power of attorney, transferred those monies
4 to Eufora which then went to Mr. Gaarn's account.

5 *When you guys showed it to me.*

6 But what did he say when questioned on
7 cross-examination? I reminded him in his direct
8 examination that he said he is a bit of a paper rat.

9 *Mr. Haley: I'm a bit of a paper rat. That's*
10 *what you just said a short moment ago. Is that correct,*
11 *Mr. Rucchin?*

12 *No, I'm Mr. Ranford.*

13 *Yes.*

14 *And by that term, by the way, all you hockey*
15 *players, you all have the same physique, and to your*
16 *credit that's quite all right. Okay. But he goes on to*
17 *say.*

18 *Question: I'm a bit of a paper rat. What do*
19 *you mean by that?*

20 *Answer: Well, I try and keep as much paperwork*
21 *as possible on, as far as my bank records and that sort of*
22 *thing. When I pay my bills, I guess when -- the biggest*
23 *issue a professional athlete is, you have to worry about*
24 *being audited so I try to hold on to whatever I can.*

25 *So if you get a letter, let's say, from a bank,*

Summation - Haley

5782

1 you will retain it, correct?

2 *Answer: Most times. I do have emails.*

3 He goes on.

4 What then occurred, ladies and gentlemen, is, he
5 was shown in cross-examination two documents. Charles
6 Schwab February 6, 2009, reflecting that \$100,000
7 transfer.

8 *Next step. If you do not recognize this
9 transaction or if you have any questions regarding this
10 transaction, please contact us immediately at the
11 telephone number above.*

12 And that correlates with the February 6, 2009,
13 transfer that he claims he knew nothing about. This paper
14 rat apparently did not comprehend that document.

15 We know, Kenner Exhibit 88, May 4. Amount of
16 transfer, \$100,000.

17 *Again, if you do not recognize this transaction
18 or if you have any other questions regarding the
19 transaction, please contact us immediately at the
20 telephone number above.*

21 If the government was eliciting that testimony
22 from Mr. Ranford, as they did, and you heard repeatedly
23 that all these documents were acquired by the defense
24 through the discovery process where we received them, they
25 were then passed along to my client and now they become

Summation - Haley

5783

1 defense exhibits as well, these government witnesses were
2 interviewed by the government before they testify, and if
3 he said no, I knew nothing about it, well wait a minute,
4 Bill. Could you explain this to us? They apparently
5 elected not to do it.

6 And that's what I meant, ladies and gentlemen.
7 When I said I would do everything in my power to see to it
8 that you wold have all the information available to you to
9 make an informed decision as to whether or not the
10 government has proven its case beyond a reasonable doubt,
11 the defense had to make sure throughout this entire trial
12 that documents in the possession of the government that
13 would suggest that a witness is not necessarily telling
14 you the truth, the whole truth, and nothing but the truth
15 had to be brought to your attention.

16 As far as Bill Ranford is concerned, much like
17 the interview with John Kaiser, we have government
18 telephonic exhibit 3500WR2. And there is information
19 contained on that. There is information regarding Eufora
20 investment.

21 And on the next page what do we see? These are
22 notes of an interview of Bill Ranford as conducted by
23 Scott R, Matt G, Scott Romanowski, mat Galioto, wherein,
24 during the course of that interview, someone said total,
25 it says 300, there was another number there, in Eufora,

Summation - Haley

5784

1 several times Eufora 2009, 100K February, 100K May.

2 Well, the idea of an interview, ladies and
3 gentlemen, is that the agents call the individual and ask
4 them questions and he responds to the questions. So when
5 the government elicits, as we heard in this testimony, his
6 denial of having any knowledge of those \$100,000 transfers
7 on those two occasions, it was inconsistent with the notes
8 taken by the government of him during this telephonic
9 interview on July 25, 2012, and it was inconsistent with
10 the Schwab records that I have just shown to you.

11 And the government remained silent as they sat
12 at that table. No redirect of Bill Ranford to suggest as
13 to how that testimony had to be, how that testimony
14 evolved when documentary evidence suggested something
15 else.

16 I told you that one of the issues that you would
17 consider when you examine the government's case -- and as
18 I said, it is the government's case that is on trial
19 here -- was whether or not the government was coaching its
20 witnesses. How many times do you recall -- how often did
21 you hear the phrase *I don't recall* from a government
22 witness when they were pressed on cross-examination on an
23 issue that might be inconsistent with their direct
24 testimony? Maybe as many times as you heard me say *no*
25 *objection*.

Summation - Haley

5785

1 By the way, you will have an opportunity to have
2 read back to you any person's testimony you so choose.
3 And I would suggest as relates to that, have the testimony
4 of Steve Rucchin read back, if that is your desire,
5 during, cross-examination and count the number of
6 instances where he says *I don't recall, I don't recall, I*
7 *don't recall.*

8 But what would occur is, after the witness on
9 cross-examination would say *I don't recall*, the government
10 would then in redirect fire -- fire -- a number of leading
11 questions to the witness.

12 Now, they testified they didn't recall the
13 conversation until the government gets up and on redirect
14 says in substance:

15 *Well, isn't it true that you weren't told this?*
16 *Oh, I recall I wasn't told that.*

17 *Isn't it true that you weren't told this?*

18 *Well, I recall I wasn't told that.*

19 They teed up the questions for them, ladies and
20 gentlemen.

21 You know, it is all right when you are playing
22 hockey to have that team spirit, that collective mentality
23 that we are all here to pull for the team. And those
24 hockey player clients in this case, they are playing for a
25 pretty powerful team. They are playing for the United

Summation - Haley

5786

1 States of America. They know a winning team when they see
2 it.

3 And I hate to use this analogy. I'm not
4 necessarily a hockey fan. So the government fired the
5 puck to them, and they instinctively turn and fire that
6 puck into an open net. And it is an open net because the
7 only one that can hold them accountable for any false
8 testimony that they may give on the stand in terms of
9 presenting a charge to a grand jury regarding that perjury
10 is the United States Attorneys office.

11 It is the only time I will use this phrase
12 because it is your determination as to whether or not
13 witnesses lied to you. So in the 19 instances where Mr.
14 Miskiewicz said: Phil Kenner lied to you on this and Phil
15 Kenner lied to you on that, Phil Kenner lied to you on
16 this, Mr. Miskiewicz is not testifying, ladies and
17 gentlemen.

18 So when he asks that first question of Phil
19 Kenner:

20 *Isn't it true that your entire testimony is
21 nothing but an elaborate lie, and Phil said no, you know
22 what the testimony is? The testimony is, no, it is not a
23 lie, because Phil Kenner is under oath, not Jim
24 Miskiewicz.*

25 Well, I will say, as relates to any of the other

Summation - Haley

5787

1 witness. You make the determination as to their
2 credibility subject to cross-examination.

3 Phil Kenner was on the stand for three and a
4 half days. And let me comment upon this, ladies and
5 gentlemen. Who were the witnesses that, from your
6 perspective, after they took the witness stand you had a
7 sense that they were credible witnesses? Mr. Rozenbloom,
8 perhaps remember him? Mr. Foster, perhaps. The witnesses
9 that give you detailed answers to detailed questions I
10 submit to you are being truthful.

11 And if nothing else perhaps to a fault, Phil
12 Kenner gave you detailed answers to questions, did he not?
13 Is that the hallmark of someone who is lying? He had a
14 remarkable capacity to recall these events because he was
15 intimately involved in these events. And I suggest to you
16 that complicated financial transactions over an extended
17 period of time do not equate to criminal activity.

18 I told you when we opened, or when I opened on
19 May 4, that we don't dispute any of the bank records that
20 are submitted or admitted into evidence. It is not a
21 question of what the bank records say.

22 And indeed that is why I lost count. I dream
23 about it *no objection* in my sleep. Those records should
24 go in. I did say to you in my opening statement it is the
25 interpretation and meaning of those bank records as to

Summation - Haley

5788

1 whether or not they constitute a crime.

2 Now, the government, and frankly I think it is
3 consistent with its opening statement where you were
4 reminded about hockey players and how they grew up and how
5 they aspired to be hockey players, their struggle to
6 become a hockey player. That is perfectly legitimate.

7 These men worked hard. They became professional athletes,
8 and to their credit they made a great deal of money.

9 But the government has a playbook. And it's
10 like if this is a fraud case, we have to have an elderly
11 victim, we have to have someone who talks about their
12 nestegg being shattered, we have to have a blue-collar
13 worker and contrast him against the spend-thrift playboy.

14 And you got all that. You got all of it,
15 beginning with Ethel Kaiser. What a lovely woman.
16 Remember Ethel? Eight children in 10 years. 14
17 grandchildren.

18 She was on the stand for perhaps 15 minutes, and
19 what we learned is that on the recommendation of her son
20 John she made various investments, loans, and by her
21 testimony she was paid back. There was some question
22 about whether or not there was still a \$70,000 investment
23 in Eufora out there, but John Kaiser testified that my mom
24 was completely paid back for all of her monies as relates
25 the her investments.

Summation - Haley

5789

1 I'm sure she was. I'm sure if the investment
2 that John Kaiser recommended his mom make were not paid
3 back, I think his nine other siblings would have had
4 something to say about that.

5 But there was also an instance which is kind of
6 a defining moment because she testified that, when asked
7 by me, do you recall your son John after 9-11 traveling to
8 Hawaii to look at property there? And she said I don't
9 recall that.

10 It was probably the only instance where, when a
11 witness said I don't recall that, it was truthful
12 testimony. You would think well, how could she not recall
13 that? Why? Because for a woman at that age deceit is not
14 part of her makeup.

15 They just put Ethel Kaiser on the stand to
16 appeal to your emotion. That is why they did that. She
17 suffered no financial loss ultimately as a result of
18 recommended investments by John Kaiser, certainly not at
19 the hands of Phil Kenner.

20 You recall of course the testimony of Kristin
21 Peca. That is where they got in the nestegg testimony.
22 To their credit, when Michael Peca retired from hockey, by
23 their own testimony, he had a \$20 million contract. Your
24 recollection will control. I think over the career he
25 made \$28 million.

Summation - Haley

5790

1 By the way, that is not to say that the wealthy
2 or the very wealthy are less deserving of the protection
3 of our criminal statutes than anyone else. But their
4 nestegg was not shattered by Phil Kenner.

5 We had the blue collar worker, and that was Nick
6 Privilotto. Nick Privilotto, electrician, hard-working
7 guy, no question about it. But they had to elicit that
8 statement from him that Phil Kenner once told him about
9 the \$25,000 cabana party.

10 As a matter of fact, if you check the
11 transcript, he almost forgot to say it. They kind of had
12 to lead him into that: What about the cabana party
13 comment? Oh, yes. Phil Kenner told me there was a
14 \$25,000 cabana party.

15 That didn't take place, ladies and gentlemen.
16 That was part of this playbook where there are trying to
17 appeal to, not your intellect, not your collective
18 judgment, but trying to appeal to your emotional side, to
19 paint the picture of the fraudster who is shattering
20 nesteggs, stealing from the elderly, and contrast that
21 against a hard-working guy like Nick Privilotto.

22 Now, we do have, as I characterize it, the chart
23 and the heart. And again, I don't mean to be facetious,
24 but do you recall when there was an instance actually
25 involving \$17,000 paid out to Phil Kenner and that chart

Summation - Haley

5791

1 was introduced into evidence, it showed that there had
2 been a deposit, frankly I forgot the hockey player at that
3 point in time, \$100,000, then later \$17,000 was paid out
4 following the \$100,000 deposit. I will find that and it
5 will be in the defendant's exhibits.

6 But what was testified to was: Well, we only
7 started with \$100,000 came in. And then we saw that
8 \$17,000 dollars going out to Phil Kenner shortly after
9 that.

10 They didn't go further up the bank records to
11 show the \$25,000 deposit from Phil Kenner. They didn't go
12 up the bank records to show the \$65,000 deposit from Tommy
13 Constantine. And the answer is well, we just started
14 there.

15 You know, it occurred to me. You see smoke
16 billowing out of the window of the room of our neighbor's
17 child. You run over, push open the door, run up, grab the
18 child, and run out the front door, the same door you
19 pushed open. And you get charged with kidnaping.

20 And all the government does is, they show the
21 video of you going in the house and the video of you going
22 out of the house. They kind of ignore what happened in
23 between.

24 The testimony of John Osborn, the government's
25 expert witness. John Osborn was, without question,

Summation - Haley

5792

1 qualified to render an expert opinion. I don't dispute
2 that. But what did we hear?

3 We saw and heard him walk to you and present
4 this chart so that you might review it within, let's say,
5 15 feet of you. You were also given individual sheets, as
6 I recall, to hold in your hand so that you could then
7 apparently, should you not be able to see this chart, be
8 able to look at the individual charts you had in your
9 hand.

10 And he told you as a result of his analysis we
11 can conclude that these signatures are nongenuine.

12 Well, he did say that. But when questioned on
13 redirect about a report, let me just read to you the
14 testimony so you have a full understanding.

15 *Question: Mr. Osborne, my name is Rick Haley.
16 I represent Phil Kenner.*

17 *Not less than five minutes ago you stood in
18 front of the jury with these charts and testified, perhaps
19 within 15 feet of this jury, that we can conclude that
20 these signatures are nongenuine.*

21 *That was your direct testimony. Correct?*

22 *Answer: Yes. Correct.*

23 *And you said that on more than one occasion, did
24 you not, in front the jury about five minutes ago?*

25 *Answer: Yes.*

Summation - Haley

5793

1 *You didn't qualify that statement, did you, sir?*

2 *We can conclude that these signatures are nongenuine.*

3 *You didn't qualify that statement.*

4 *Answer: Correct.*

5 *Now, you rendered a report, did you not, in*
6 *advance of your testimony today, which was provided to the*
7 *government? Is that correct?*

8 *Yes.*

9 *And you have an understanding, acknowledged,*
10 *that the report would be provided to the attorneys for the*
11 *defendants accused in this matter.*

12 *Answer: Yes.*

13 *Just take a look at Kenner Exhibit 105. Do you*
14 *recognize that document, sir?*

15 *Yes.*

16 *What is it?*

17 *This is a copy of the report which I issued on*
18 *May 4, 2015. However, it does lack the signatures page of*
19 *that report.*

20 *Question: But this is the report of your*
21 *findings and report that reflects your expert opinion as*
22 *relates to those two signatures in question.*

23 *Answer: Yes.*

24 *And, sir, would we agree that in the written*
25 *portion of the report under the bold-faced heading you*

Summation - Haley

5794

1 *write --*

2 *Would you like me to read it?*

3 *Question: I will read it, sir. I'm just asking*
4 *you the following, if I read it correctly.*

5 *Finding. It is highly probable in the opinion*
6 *of the undersigned that each of the two convicted*
7 *signatures are nongenuine and the product of an attempted*
8 *simulation of John Kaiser's signature.*

9 *This finding is intended by the undersigned to*
10 *express an opinion which meets and exceeds the threshold*
11 *commonly described within the phrase "within a reasonable*
12 *degree of certainty."*

13 *Why didn't he qualify that answer when he told*
14 *you: "We can conclude these signatures are nongenuine?"*

15 *Now earlier in his testimony he did make*
16 *reference to that, ladies and gentlemen. But it is*
17 *important that an expert witness be very precise in his*
18 *expert opinion to you. And that didn't happen.*

19 *It continued, because I asked him a question:*

20 *Sir, isn't it true that in your field of*
21 *expertise it is more of an art than a science?*

22 *And in substance he said: No, I would disagree*
23 *with that. It is more of a science than an art. Fair*
24 *enough. I then asked him question: Well, as a science --*
25 *and I'm paraphrasing, ladies and gentlemen, but you may*

Summation - Haley

5795

1 recall this. And it is in the testimony.

2 As a science is it susceptible to computer
3 analysis? In other words, do you use computers and
4 software programs to take images of the writings and then
5 compare it to a computer analysis? He said yes.

6 As a matter of fact, there is a software program
7 that he is aware of that has been in existence for some
8 period of time that is designed by, I forget the
9 gentleman's name, but a person highly regarded in his
10 field of study. And the question was asked:

11 *Well, did you utilize that program to assist you
12 in your analysis of the handwriting for purposes of this
13 criminal prosecution?*

14 *No.*

15 *No? It wasn't that important?*

16 Does high degree of probability, ladies and
17 gentlemen, in terms of the opinion of an expert equate to
18 proof beyond a reasonable doubt? Well, listen to his
19 Honor's instructions in connection with proof beyond a
20 reasonable doubt. Hear whether you see something like
21 *high degree of probability.*

22 (Continued on the following page.)

23

24

25

Summation - Mr. Haley

5796

1 MR. HALEY: (Continuing).

2 Darryl Sydor testified. And other witnesses
3 testified regarding forgeries or what they allege to be
4 forgeries. And other than this singular document, and I'm
5 referring to the consulting agreement, there is no other
6 expert opinion as relates to any other alleged forgery by
7 the government witnesses. Why not? If any of those
8 witnesses had, prior to the testimony before you, told the
9 government, my signature is forged on a significant
10 document, bank document or something of that nature, rest
11 assured that expert opinion would have been on the stand
12 to verify that for you. But we do have the expert opinion
13 to bolster the testimony of --

14 You know there was testimony as well, Lainey
15 Donlon testified as to her relationship with Brian Berard,
16 being close friends over the years with Brian Berard. She
17 testified that, she says there was a time she saw Phil
18 Kenner copying a signature, multiple signatures on some
19 document. No expert testimony regarding that, ladies and
20 gentlemen, because no such document exists. You will not
21 see this document as part of the government's proof. It's
22 not in any of the thousands of exhibits that the
23 government has acquired through this extensive search over
24 many years, because it doesn't exist.

25 You know there was something that Lainey Donlon

Summation - Mr. Haley

5797

1 said that did have a kernel of truth. And that was when
2 she said to you, It's all so sad. You know, what is also
3 sad because as you saw in the photograph of Phil Kenner
4 and Sergei Gonchar, there was and did exist over a long
5 period of time a close relationship between Phil Kenner,
6 the hockey player clients, a relationship of friendship
7 and trust. And that's what she meant. It's all so sad.
8 And that occurred when the FBI targeted Phil Kenner for an
9 investigation, and now the current prosecution.

10 Okay. Let's address each crime as alleged in
11 the indictment. And I will begin with the lines of
12 credit.

13 Your recollection, your collective recollections
14 will control. But as I recall, during the direct
15 testimony and cross virtually to a person they were
16 disclaiming knowledge about what was happening with the
17 Northern Trust accounts, the bond accounts, the lines of
18 credit -- they were kept in the dark. And they were
19 unaware of the default notices coming out, default letters
20 coming out.

21 Kenner Exhibit 207. And these exhibits were
22 introduced during the testimony of Phil Kenner, who
23 authenticated the documents as part of our defense. And
24 you may recall there were a number of those e-mails that
25 were up on the large screen there that suggested that,

Summation - Mr. Haley

5798

1 contrary to what many of these witnesses had told you on
2 direct about keeping, being held in the dark about what
3 was happening with the lines of credit and the default
4 letters, that there were e-mail communications.

5 Steve Rucchin, Exhibit 207. To Phil. Give me a
6 call today. Want to talk about N Trust. Told I was in
7 default, interest and late fees, and recently received a
8 bill for over ten grand.

9 That occurred on April 16, 2009. That was up on
10 the screen. Some of them were. And all of these, ladies
11 and gentlemen, all of these you can review as you
12 deliberate for purposes of this case, so I'm not going to
13 go through each and every one of them. But that was Steve
14 Rucchin.

15 Brian Berard, 4609. No rush it's about NT line
16 of credit. And sign Schwab F X from Stef.

17 Owen Nolan. Where's the packet that needs to be
18 signed. VP needs \$200,000. Well that talks about the
19 Toronto settlement. And then as he goes on, Phil Kenner
20 testified that the conversation, that included
21 conversations that relate to Northern Trust as reflected
22 in the e-mail.

23 Owen Nolan received Northern Trust papers, asked
24 what are the papers for. And the FedEx's.

25 Mr. McKee testified he was unaware that his line

Summation - Mr. Haley

5799

1 of credit and his bonds were taken by Schwab. We have
2 actually Government Exhibit 1526, Jay McKee, 20 Governors
3 Lane, -- New York. It's a complete history of his line of
4 credit indicating the existence and status of the line of
5 credit on May 31 of 2009.

6 You may recall that when presented with
7 documents of this nature by the defense, on occasion there
8 would be testimony from government witnesses, I don't
9 recall this.

10 They would verify, however, that that's their
11 address. Yes, I was living there at this point in time.
12 Some of the documents were return-receipt requested. But
13 there was no evidence that Phil Kenner had the ability to,
14 the power or the authority to interfere with the delivery
15 of mail where it is specifically addressed to an
16 individual by the United States Postal Service or Federal
17 Express.

18 All of the testimony that you received through
19 the government in it's direct case regarding lack of
20 knowledge as to what was happening with the lines of
21 credit, ladies and gentlemen, I suggest to you is placed
22 in question by documentary evidence.

23 This is the Northern Trust Bank records as
24 obtained in this case pursuant to a defendant's subpoena.
25 Time and time again hockey player clients are signing

Summation - Mr. Haley

5800

1 these documents to authorize the transfers, to keep the
2 line of credit in place with knowledge there are pledge
3 agreements, that should there be a default, that their
4 bonds would then be lost because of being pledged pursuant
5 to that line of credit.

6 No evidence that these are forged signatures.

7 Again, if there were forged signatures rest assured that
8 the government would have introduced expert testimony as
9 relates to those documents.

10 So we have a statement from Owen Nolan --
11 something different, but I'll get to that in a moment.
12 No, I'll get to that now.

13 Owen Nolan testified that he was one of those
14 victims where Phil Kenner had accessed his line of credit
15 without his knowledge. Yet Owen Nolan had filed an
16 arbitration. You heard about that pursuant to the
17 standard advisors agreement with Phil Kenner. And within
18 that arbitration he never made a claim that Phil Kenner
19 had accessed his line of credit without Phil Kenner's
20 (sic) authorization.

21 He did make a claim that he was unaware of the
22 Hawaii investment -- excuse me -- the Hawaii money going
23 from Hawaii to Mexico. That was his claim at the time.

24 But when asked, Now, when you filed the paper to
25 commence the arbitration before the arbitration panel,

Summation - Mr. Haley

5801

1 isn't it true, sir, that at that point in time you made no
2 claim in your papers before the arbitration panel that
3 Phil Kenner had access to your line of credit for purpose
4 of Little Isle IV investment without your authorization?

5 Could you repeat that, I didn't understand that?

6 Question: Sure. Isn't it a fact, sir, that
7 when you filed the claim with the American Arbitration
8 Association with reference with your dispute with Phil
9 Kenner, you did not at that point, in 2009, make any claim
10 that Phil Kenner had access to your line of credit without
11 your authorization?

12 Answer: I don't recall.

13 That's another, I don't recall. You remember
14 that -- the answer would be, Yes, I did. Or, No, I know he
15 accessed my line of credit would my authorization. So the
16 answer is, Yes. I don't recall?

17 Kenner Exhibit 11 is a master note signed by
18 Michael Peca on March 31, 2005.

19 Kenner Exhibit 12 is a master note signed by
20 Michael Peca, July 1, 2005.

21 Kenner Exhibit 17 is the application made by the
22 Pecas with reference to the their line of credit.

23 Kenner Exhibit 14 is the promissory note that
24 they, Michael Peca signed, that pledged his bond as
25 collateral to the line of credit.

Summation - Mr. Haley

5802

1 Kenner Exhibit 14 is a change in firm agreement
2 signed by Michael Peca.

3 Let me also speak, ladies and gentlemen, about
4 the government's allegation concerning, with all of their
5 charts, the use of the lines of credit to pay off another
6 line of credit. We did give you a chart. And our chart
7 didn't have the colors and the pictures or anything of
8 that nature. But it did indicate the uses for which the
9 lines of credit were committed as relates to the
10 development of the Hawaiian Land project, and the list is
11 in evidence. You'll have an opportunity to view it.

12 But it did involve paying off other lines of
13 credit. That was, these were pooled funds, meaning that
14 once the money came into the Little Isle IV account, it
15 was used for any number of purposes. And once it became
16 part of the pool, if there was an interest payment due on
17 someone else's line of credit, it got paid. Why? So that
18 the collateral did not get lost.

19 As a matter of fact, you heard there was a
20 legitimate business reason for doing it that way, because
21 you could place a bond and the bond is going to continue
22 to earn interest, and you don't want any lines of credit
23 to go into default. So you would utilize part of that
24 pool once it goes into the pool to pay off someone else's
25 line of credit.

Summation - Mr. Haley

5803

1 That is not a scheme to defraud. That's not
2 outright theft, as you would hear with an elevated voice
3 by the prosecutor in this case. That was part and parcel
4 of the investment modality that Phil Kenner was utilizing
5 as the managing member of Little Isle IV.

6 All of those times when the government would
7 then isolate on a master note -- you read that towards the
8 end with Sergei Gonchar.

9 And they said, Well, were you aware at this
10 point in time, \$375,000 was being taken out of your line
11 of credit? And indeed that would increase the requisite
12 bond pledge.

13 No, I wasn't aware of that.

14 You can't tell me that is fraud. That was the
15 business protocol by which the lines of credit were being
16 used to keep the investment vehicle in Little Isle IV
17 alive.

18 And you heard that it wasn't a situation where
19 Phil would -- the business model wouldn't work if every
20 time Phil had to access someone's line of credit for the
21 purpose of a particular expense, he would call them up
22 half a world away and say, Oh, by the way this is what I'm
23 doing.

24 They knew by way of each one of those pledges --
25 and you saw them in evidence -- that Phil Kenner was

Summation - Mr. Haley

5804

1 authorized to access my line of credit. And that is what
2 happened here, ladies and gentlemen. Full authorization,
3 no theft or fraud. This was not a scheme to defraud as
4 relates to any aspect of it. But certainly in no respect
5 is there proof beyond a reasonable doubt that the manner
6 in which the lines of credit were utilized by Phil Kenner
7 constituted a crime.

8 You know, Joe Juneau, it was brought up on the
9 government's summation -- Yes, they did use a line of
10 credit to, access to a line of credit from Owen Nolan to
11 pay off Joe Juneau's line of credit, so that his line of
12 credit was satisfied and there was no loss of his bond as
13 pledged. And that is what that e-mail meant.

14 And you may recall that that happened because
15 Joe Juneau though an original investor in Little Isle IV,
16 decided, I committed to the investment but I want out.

17 And Phil said, You know that's a little unusual.
18 You're now leaving us in the lurch. We're trying to get
19 this project started. You say, I'm in. And then you
20 change your mind. Well, okay.

21 So they brought other investors in. Those
22 investors then obtained their percentage interest in the
23 Hawaiian land development as represented by Little Isle
24 IV, and Joe Juneau was paid out, got out of it. Joe
25 Juneau lost no money in the final analysis, either by way

Summation - Mr. Haley

5805

1 of his commitment to Little Isle IV, or whatever
2 investments he made in Eufora. He is not a victim.

3 And for the government to say, Well, the persons
4 do not have to lose money to be victims. That is
5 absolutely true. Of course that is true. But what
6 happened here was not designed or intended to defraud
7 anyone.

8 THE COURT: Do you want take a break?

9 MR. HALEY: Yes, your Honor. May we take a
10 break?

11 THE COURT: Don't discuss the case.

12 (A recess was taken.)

13 (After recess the following occurred outside the
14 presence of the jury.)

15 MR. HALEY: Your Honor, I know I'm not going to
16 be finished at 4:30.

17 THE COURT: Okay, we'll stop at 4:30.

18 MR. HALEY: Thank you, sir.

19 I do recall the Court saying to Mr. LaRusso, if
20 you need five hours you can have five hours.

21 THE COURT: Did I?

22 MR. HALEY: It is not my intention. I was
23 raising my hand.

24 (The jury entered the courtroom.)

25 THE COURT: Mr. Haley.

Summation - Mr. Haley

5806

1 MR. HALEY: Thank you.

2 It is certainly not my intent or desire to test
3 your patience, ladies and gentlemen. I hope that at least
4 the summations of both the government as well as the
5 defense will result in at least your deliberations being
6 focused on the issues, at least as relates to how the
7 litigants or the attorneys view those issues. And perhaps
8 it will assist in moving those deliberations along in a
9 meaningful fashion. Which is not to say you should not
10 give full and complete consideration during your
11 deliberations to both the government's case and our cases
12 and what the defense says. So please, bear with me.

13 Thank you.

14 I did mention, ladies and gentlemen, we don't
15 have many charges, but we got a couple. And this relates
16 to the Hawaiian land development. This is the chart you
17 may recall, indicating the various contributions of the
18 hockey player investor clients in Little Isle IV and any
19 expenses. We did reference that earlier, and I wanted to
20 locate it for you.

21 So rather, at least this is a rather detailed
22 representation of the expenditures. And I might add,
23 ladies and gentlemen, as Judge Bianco will tell you, the
24 burden of proof never shifts when a defendant puts a case
25 on. The burden of proof always remains upon the

Summation - Mr. Haley

5807

1 government to prove their case beyond a reasonable doubt.

2 Mr. Kenner testified that these expenses, as
3 well as the contributions as set forth on that document
4 were supported and are supported by bank records. And
5 those bank records, as indicated by Mr. Kenner during the
6 course of his testimony, have been and are in the
7 possession of the government.

8 So if you -- if it were an instance, let's say
9 where there was not an expense related to land plans,
10 there was not an expense related to archeology, there was
11 not an expense related to salary and payroll; rest assured
12 that the government would have cross-examined Phil Kenner
13 on the absence of such expenses.

14 Consulting fees. Well we know there were
15 consulting fees. As a matter of fact, the Urban Expansion
16 Loan and indeed the -- well, specifically the funding
17 consultant agreement was just that, a funding consultant
18 agreement. So all of those expenditures, ladies and
19 gentlemen, were part and parcel of the Hawaiian Land
20 development project.

21 That doesn't suggest some sort of deceitful
22 conduct on part of Phil Kenner. We learned that
23 throughout this process Phil Kenner was actually texting
24 people, you're going to see some of those texts at one
25 a.m. to keep this project going. The idea that somehow

Summation - Mr. Haley

5808

1 this, the Hawaiian land project was part and parcel again
2 of a massive scheme to defraud.

3 You saw the photographs. This project, the
4 Hawaiian land project had real potential; beautiful,
5 beautiful scenery, beautiful property, architects hired,
6 Chris Manfredi testified as to what they were trying to
7 accomplish.

8 We know -- and this is a point I'll discuss a
9 little later on -- we know that it didn't come to fruition
10 through no fault of Phil Kenner. It didn't come to
11 fruition because what ultimately happened was land values
12 tanked, and Lehman Brothers went bankrupt. That is what
13 happened here.

14 We will be speaking, rest assured before I
15 finish my summation, about the Jowdy loan. Because that
16 is critical in connection with what transpired here.

17 But it was the real deal. You know, this is
18 not, this is not a Bernie Madoff type of Ponzi scheme as
19 Mr. Miskiewicz would suggest to you, where he was taking
20 investor money and not investing it at all, but simply
21 paying back other investors with investors' money.

22 They had, they had titles of land. You saw the
23 title documents. They had consulted for purposes of
24 obtaining vertical construction loans. And the ideas in
25 connection with those loans from -- to hard money loans,

Summation - Mr. Haley

5809

1 was that though the hockey player investors had
2 contributed and committed significant amounts of money to
3 the Hawaii land development project, in order to make this
4 project work you needed additional funding. Wasn't that
5 crystal clear?

6 Unless you were going to take an instance where,
7 where you collapsed the project and didn't look to make
8 its potential, there is going to be the risk and you're
9 looking to ultimately see that project as successful.

10 The Lehman loan was huge. Lehman had committed
11 to, I believe it was \$105 million. That was part and
12 parcel of keeping the project going. We'll speak later,
13 because I just want to go back to my perspective about
14 whether when Lehman, when the Lehman loan came through,
15 the money that went to Tommy Constantine by way of the
16 Urban Expansion Loan was fraudulent. I'll talk about that
17 at an appropriate time.

18 But let me also give you an example. Phil
19 Kenner would track, and this is just one example -- here
20 is an example of what happened to Sergei Gonchar's line of
21 credit. It shows where the contribution was made on a
22 given day. It shows where the money went. It's
23 consistent with the charges you saw a moment ago --
24 direct, employee payroll, expenses reimbursed through
25 Kenner -- Phil was entitled to reimbursement of expenses

Summation - Mr. Haley

5810

1 associated with the Hawaiian land project. He was
2 entitled to take a draw. As a matter of fact, John Kaiser
3 told you that. No salaries, sure, salaries were part and
4 parcel of normal approved business expenses, expenditures.
5 And to suggest that the hockey player clients were somehow
6 misled when Phil Kenner took an expense reimbursement
7 without calling up ahead of time, or again as indicated
8 here utilized Sergei's line of credit in connection with
9 an attorney payment here, in connection with these
10 expenses, is simply untrue.

11 And as I said a moment ago, as relates to the
12 bank records that would support that, the government is in
13 possession of those bank records. So if that direct
14 11/9/05, \$2,166 -- payment for -- 4000 employee payroll
15 was not supported by bank records, you would have been
16 hearing Mr. Miskiewicz. I don't know if he talked about
17 rabbit holes. But you would be hearing Mr. Miskiewicz
18 talking about how the bank records did not support what
19 the defendant is putting in front of you. Believe me.

20 Well, actually it's kind of a shame because we
21 know what is happening with real estate. Can you imagine
22 Lehman Brothers going bankrupt? What would that property
23 -- no expert testified in that respect. But there was
24 some evidence that the potential for the investment in the
25 Hawaiian land development project ultimately explode.

Summation - Mr. Haley

5811

1 By the way, you know, we did talk about evidence
2 in connection with ownership interest. It was an issue to
3 be decided by you. The reality is that those ownership
4 interests are and were recorded on the books and records
5 of Little Isle IV. And once it is recorded on the books
6 and records of Little Isle IV, any one of those hockey
7 player investors, should there come a point in time where
8 the property was sold and they weren't getting a return on
9 their investment, they could certainly consult an
10 attorney. And we have a record that says, there's your
11 ownership interest. You have a fairly compelling case in
12 court to get your money back. Because it is reflected on
13 the books and records.

14 So as an example, Kenner said that on the K-1,
15 Kenner Exhibit 62. Withdrawn.

16 (Continued on the following page.)

17

18

19

20

21

22

23

24

25

Summation - Haley

5812

1 (Continued from the previous page.)

2 BY MR. HALEY: Let me just also give you an
3 example of what transpired at least in connection with
4 Peca LLC distributions, the chart matches up with the bank
5 records once again, and I will not go through all of this
6 document. You'll have an opportunity to review it. But
7 we do have, and we'll talk about it at the appropriate
8 time. We do have a \$395,000 to Kaiser, Led Better loan.
9 And let me address that now because the operating
10 agreements for Little Isle IV, the original operating
11 agreement and it is in evidence, the little original
12 operating agreement without question focused solely and
13 exclusively on the Hawaii land development, no question
14 about it. It existed consistent with the discussion that
15 Phil Kenner had with his hockey player investors that this
16 is all about Hawaii and let's invest in Hawaii. That
17 document you will see crystal clear. There is a special
18 projects provision in that document but that talks about
19 the expenditure of money to do research. I wouldn't
20 suggest to you the special projects provision in the
21 original Little Aisle IV authorized lending, it didn't.
22 But there did come a point in time there was a
23 modification to the operating agreement and that is also
24 in evidence, and that modification specifically permitted
25 in writing lending in the discretion of the managing

Summation - Haley

5813

1 member which was, still it is, Kenner, and that document
2 which was signed by Phil Kenner, John Kaiser, interesting
3 enough, no allegation that John Kaiser's signature at
4 least by way of any expert testimony on this document was
5 a forgery, but it is John Kaiser. I don't know what to
6 say other than there is no proof that this signature on
7 the document is a forgery, and that is the document of
8 which reads as follows: At the sole discretion as the
9 managing member Little Isle IV may participate as a lender
10 if deemed by the managing member to be in the best
11 interest of the LLC.

12 Well, let's get right to the point with
13 reference to the lending that clearly occurred out of
14 Little Isle IV to Ken Jowdy for purposes of Ken Jowdy
15 utilizing that money as relates to the Mexico and the
16 development of the property. That loan was indeed a loan
17 that initially did not have a document in support of.
18 Initially there were loan payments, money coming out of
19 Little Isle IV going into down Mr. Jowdy's way by various
20 maybe circuitous routes, but heading down there.

21 Indeed Phil testified, and the bank records
22 support it, and if there wasn't the Government wouldn't
23 have cross-examined him on it, when it went out Jowdy was
24 paying it out, with interest. There came a time as
25 testified to by Phil Kenner it is a decision that is made

Summation - Haley

5814

1 actually involving John Kaiser who we say, look, we have
2 money going out of Little Isle IV, the money is going to
3 Ken Jowdy. Our project right now is in a state of flux or
4 at least because of the time it took, remember all the
5 time it would take to get the necessary permits and
6 projects in place, develop land, we have access to money,
7 through the line of credit, and they loan this out as they
8 did at 15 percent interest, as I recall, so that we're
9 making some money on the loan. That was a decision that
10 was arrived at by both Phil Kenner and John Kaiser.

11 There comes a point in time where with John
12 Kaiser's knowledge, if not insistence, let's memorialize
13 this loan by way of a written document, and indeed that is
14 in evidence and that's the revolving line of credit as
15 signed by Ken Jowdy.

16 This provision here at the sole discretion of
17 the managing members Little Isle IV may participate as a
18 tender if deemed by the members of the LLC if the
19 operating agreement that authorized that, and again it is
20 in evidence, ladies and gentlemen, that authorized that
21 tending to Ken Jowdy.

22 Now, Phil testified that he did speak with his
23 hockey player clients as relates to the loan coming out of
24 Little Isle IV to Jowdy. There's a question, admittedly,
25 as to whether Phil actually spoke with each one of them

Summation - Haley

5815

1 before the lending had to take place, but each one of them
2 did become aware of that loan. As a matter of fact,
3 Michael Peca testified, it's in the record before the
4 grand jury, yes, I learned of the loan, not immediately,
5 but I learned of the loan sometimes after the money had
6 started to come out of Little Isle IV to Jowdy and I had
7 no objection to it. Why would he have an objection to it?
8 It will make him some money, and that's a business
9 decision by the way, where otherwise money is remaining
10 dormant.

11 When the Government is arguing in its summation
12 that the circumstances under which the revolving line of
13 credit document itself suggests fraud or suspicion, in
14 what sense, ladies and gentlemen?

15 Phil Kenner testified that there was a point in
16 time I'm with Ken Jowdy in Mexico and they did have a
17 business relationship, no question about it, Phil Kenner
18 and Ken Jowdy. And the document, specifically the
19 revolving line of credit, was created for purposes of
20 having a written document in place in order to memorialize
21 and verify the loan that existed.

22 What did he testify to? He said the document
23 was created, it was copied by Ken Jowdy and he kept the
24 original. That is not suspicion. To say that can Ken
25 Jowdy have a copy machine in his hotel room? I don't know

Summation - Haley

5816

1 if there is any testimony that it happened in a hotel room
2 or not, that is sheer speculation. We know Kenner Jowdy
3 has offices, he's running Diamonte Cabo San Lucas so to
4 suggest by way of that speculation by Mr. Miskiewicz
5 outside the record that under those circumstances it must
6 be fraudulent, I don't know how to answer that, ladies and
7 gentlemen. All I can say is this: The document itself is
8 witnessed by Robert Gaudet. You may say by way of the
9 loan document, Kenner says it is accurate, Jowdy, who
10 knows whether that is his signature, but Robert Gaudet
11 signed the document and if there is any issue -- if you
12 are creating a fraudulent document, I guess the claim the
13 Government would be, well, I forged Jowdy's signature, I
14 forged Robert Gaudet's signature. I don't now how to
15 answer that, ladies and gentlemen.

16 You know what the theory of the Government is.
17 Our theory is let's start out that Phil Kenner is a
18 fraudster and let's just make the evidence fit, so
19 everything he does must necessarily be fraudulent.

20 I don't know how to respond to that.

21 Okay. So we have of course the Little Isle IV
22 operating agreement. And by the way when it comes to the
23 operating agreements, the hockey player clients did
24 testify, I think on more than one occasion, and again
25 ladies and gentlemen it is your recollection that

Summation - Haley

5817

1 controls. We would get a lot of documents. One of them
2 said, remember that, I would pronounce is ASH -- it was
3 actually a shitload of Hawaiian documents. That's what he
4 was saying in the e-mail. So they would get those
5 documents from Phil Kenner and those documents would
6 include revised operating agreements, existing documents,
7 documents related to the Hawaii land development. It
8 wasn't a matter of Phil Kenner hiding anything like the
9 bylaws of Little Isle IV that authorized the lending as
10 relates to Mr. Jowdy.

11 So we'll get to that, but this loan, this Peca
12 that comes out as set forth that the money that went out
13 of Peca's LLC to Kaiser in the amount of \$395,000, at that
14 the point there had been an operating agreement that
15 authorized loans to go out and indeed what was happening
16 here there was a loan coming out of the Little Isle IV
17 account, no question about it, traceable to Peca's line of
18 credit, a loan to Kaiser which was permitted under the
19 operating agreement, with the expectation that Kaiser
20 would be paying it back and it would go back into the
21 Little Isle IV account and it happened in that way. That
22 of course involved the Led Better and rather than digress
23 at this point in time let's stay focused on at least the
24 Hawaiian land project because the Government tells you
25 this is a massive fraud on the part of Phil Kenner.

Summation - Haley

5818

1 By the way this is the document that I'm
2 referring to from Michael Peca, Kenner Exhibit 21: Oh,
3 yeah, thanks, cleaning up my files today. We never did
4 get the documents on the Mexico stuff. I have a shitload
5 of Hawaiian docs in Mexico. We got them. Thanks.

6 When we speak in terms of the members interests,
7 the Government made a great deal of the fact that
8 ostensibly nondisclosure of the loan in documents such as
9 the limited liability company agreement of Little Isle IV
10 dated April 26, 2006, failed to mention the Jowdy loan in
11 that document was part of deceitful conduct on the part of
12 Phil Kenner, that's the argument they make.

13 Phil Kenner, as relates to that document and
14 other documents said, these were not state of the union
15 documents. They had a specific purpose from a business
16 standpoint. This wasn't a function of looking to hide the
17 Jowdy loans from anyone. Here are the members' interest,
18 ladies and gentlemen. Members and percentages on schedule
19 (a). Again you'll have this. This is Kenner Exhibit 1,
20 the very first exhibit we wanted you to see was this.

21 You don't go through all this trouble if you are
22 creating this artificial scheme to defraud somebody and
23 this is the one, Kenner Exhibit 1, is where you see each
24 member in witness whereof, each member has executed this
25 agreement as of the date first set above. And we have

Summation - Haley

5819

1 Berard -- you know what I'll do, I'll just close my eyes
2 and pick a page.

3 We have Glen Murray, we got Mattias Norstrom, we
4 have Turner Stevenson. We got -- actually there is Phil
5 Kenner's signature. We have Greg DeVries.

6 So here is the limited liability company
7 agreement that is relevant for having proper documentation
8 in effect with reference to Little Isle IV.

9 The Government tells you that the July 21, 2006,
10 agreement which was the agreement whereby Phil Kenner
11 writes to all the members of the LLC. I'm writing to tell
12 you about a very positive development concerning your
13 Hawaiian real estate developments to Little Isle IV LLC.
14 As managing member of the company, I have the authority to
15 commit the company to the transactions described in the
16 letter. Nevertheless, I'm asking your acknowledgment and
17 consent to these transactions as they will change your
18 investment, albeit, for the better, in my opinion.

19 That sets forth the information, this was
20 actually as relates to the Lehman loan. It was required
21 by the Lehman lenders and their attorneys. As a matter of
22 fact, Phil was not trying to be deceptive or deceitful but
23 my memory of his testimony, I didn't create this, this was
24 created by the lawyers that were involved in the Lehman
25 transaction and they wanted to make sure this document or

Summation - Haley

5820

1 they needed this document in place so each one of the
2 members had an understanding as to what the loan would
3 cover.

4 Indeed we have a response form: I acknowledge
5 receipt of the letter of July 21, 2006, of Philip A.
6 Kenner, (the letter) to each of the members of Little Isle
7 IV LLC, (the Company).

8 You might remember this response form, because
9 when John Osborn testified, he testified that he relied
10 upon various documents presented to him as known signature
11 documents in determining whether or not the signature of
12 John Kaiser was non genuine. And indeed I have to remind
13 you that that report is highly probable, not that we can
14 conclude as if there is no doubt. He did that for your
15 benefit. Who do you think he meant we can conclude? He
16 said you should conclude that this signature is non
17 genuine. Well, that's your decision, ladies and
18 gentlemen, not his decision.

19 One of the known documents presented to him was
20 indeed a document signed by John Kaiser. So at least as
21 relates to the response form with reference to Kenner
22 Exhibit 93, we know that John Kaiser signed his name to
23 that document because it was given to their expert as a
24 known -- as a document wherein John Kaiser says that is my
25 signature.

Summation - Haley

5821

I don't know if you recall, but when John Kaiser was cross-examined, it was that document -- I think it was that document -- it was this document -- I apologize. I don't know if you recall but when John Kaiser testified, I showed him a document and he acknowledged it was his signature, perhaps it was this document, I don't know, and then I wanted to question him in connection with the content of that document. He said that's my signature but I didn't read it.

There was some cross-examination about, well, do you read architectural plans, things of that nature? That became part of the theme in connection with many of the Government witnesses when presented with a document that they knew existed or a document that may be contradictory to their testimony, their effort to avoid questioning on that. Well, yeah, that's my signature but I didn't read the darn thing. Okay.

The Little Isle IV, July 21, 2006, document, became really a big part of this litigation because it is Kenner 2, it's Kenner 93, Kenner Exhibit 16, Kenner 70, although that wasn't admitted in evidence, ladies and gentlemen. Okay.

I talked about the original operating agreement, Little Isle IV. I just want you to have this. It's the last time I will say it. Each one of these documents you

Summation - Haley

5822

1 have a right to request be delivered to you for your
2 review in your deliberation, but it is Kenner 25, it
3 speaks for itself. That was the original operating
4 agreement that did not contain the ability to lend.

5 The ability to lend did come -- looks like
6 Kenner Exhibit 217. Some of these exhibits, ladies and
7 gentlemen, designation numbers may change because sometime
8 they are remarked by a different number but that's at
9 least what my record reflects.

10 Let me get to the Semple point from the defense
11 perspective and it relates to the Hawaiian land
12 development. We know it didn't work out, but had Ken
13 Jowdy honored the loan commitment he made to allow for and
14 pay back at 15 percent interest, the moneys loaned to him
15 that are reflected in bank records, Phil Kenner testified
16 that as of the day he testified, that money loaned at
17 15 percent interest would concern \$18 million to the
18 Little Isle IV entity. And it would have, by his
19 calculation, made each and every one of his hockey player
20 clients whole for their investments. The hockey player
21 clients did lose money, no question about it. When the
22 Lehman loan was closed, money was then transferred, and we
23 have that in Kenner Exhibit 19, Government 2103, was then
24 transferred out of Northern Trust to various hockey
25 players. Those who had invested \$100,000, their return

Summation - Haley

5823

1 was \$42,553. So they took a loss, but it wasn't a
2 complete loss.

3 You know when it comes to that, you may recall
4 that there was at least questioning by many of the
5 witnesses wherein the Government would say, well, sir,
6 isn't it a fact that you didn't get a penny back from your
7 investment? Well, they didn't get a profit back from
8 their investment, ladies and gentlemen, but they did get
9 money back. And it translated into about 42 percent of
10 their investment, whether it was the 100,000 or whether
11 the math works out, a percentage, it may have been
12 essentially the percentage as the line of credit. We do
13 know that many of them also to their credit ended up
14 obtaining some settlement with Northern Trust, so the loss
15 they suffered was indeed compensated in part by Northern
16 Trust. Why Northern Trust did that, the reason for it,
17 it's not part of this case. God bless them. They got
18 some of the money back from Northern Trust.

19 The Government made the point, it's a legitimate
20 point, that no fraud exists if people get money back, I'm
21 not trying to say that but I am saying this: Would we be
22 here today, would we really be here today if the Jowdy
23 loan was paid back and those hockey players were made
24 whole as a result of that money coming back? And perhaps
25 as significantly, would we be here today had John Kaiser

Summation - Haley

5824

1 pursued the \$4 million in milestone payments that were due
2 Ula Makika which was then the LLC, wherein that money
3 would have gone to Ula Makika and then be available for
4 distribution to the hockey player investor clients?

5 You know, I think one of the witnesses testified
6 to this. I didn't authorize the Hawaiian loan money to go
7 to Mexico, but had it happened that Jowdy had honored the
8 loan, had it happened that John Kaiser pursued the
9 milestone payments and they all came back into the pot, so
10 to speak, would there anyone being here and saying I got
11 all my money back but I want you to prosecute Phil Kenner
12 for fraud? The Government wouldn't be taking the case.
13 That just wouldn't make sense, ladies and gentlemen.

14 No one will say, whoa, whoa, whoa, don't give me
15 the money that I invested through the LLC, don't return
16 that to me, because you never told me about the loan so I
17 don't want it.

18 They take it willingly, and I kind of suspect
19 that if that happened, you might have heard every one of
20 the hockey players investor clients saying I knew about
21 the loan, knew about it from day one.

22 The Government is orchestrating a crime here,
23 ladies and gentlemen, and they have a motive for doing it
24 and we'll be talking about that.

25 Okay. Look, I know it gets complicated, but as

Summation - Haley

5825

1 I said before, complicated financial transactions are not
2 proof beyond a reasonable doubt of criminal activity.

3 We have talked about during the course of the
4 trial and the Government in its summation talked about the
5 Urban Expansion loan. Well, the Urban Expansion loan
6 resulted in the need to preserve Waikapuna, as one of the
7 properties that was the part of Little Isle IV, and you
8 may recall that the loan was needed because they had to
9 make good in terms of making payments to, I forget the
10 senator's name, that was going to charge them significant
11 interest over a period of time had they not come up with
12 the cash to close on the purchase, and it was through
13 Tommy Constantine that the funding occurred, so that
14 Waikapuna was not lost for the Hawaiian investors.

15 As a matter of fact, Chris Manfredi confirmed
16 all of what Phil Kenner had to say about Waikapuna, in
17 terms of the need to come up with the funding to purchase
18 the property, to stop the interest payments and to do that
19 quickly. As a matter of fact, he characterized the need
20 for that loan as being urgent.

21 Who was the person who came up with the funding
22 for that critical infusion of cash at that point in time?
23 It was Tommy Constantine. And that's what the Urban
24 Expansion loan was all about.

25 Now, the Government made a big deal about the

Summation - Haley

5826

1 prepayment penalty on that loan, and Phil Kenner told you
2 that prepayment penalties of that type were not unusual at
3 all in this hard money lending market. So that was not a
4 scheme to defraud, ladies and gentlemen, it was a business
5 decision that occurred because they were in at least from
6 Phil Kenner's perspective, financial straits or a
7 financial squeeze where they needed to come up with that
8 money. Who ultimately came up with that money? Tommy
9 Constantine and actually Tommy Constantine or I should say
10 Jim Grdina, money flowed back to them, there is no
11 question about that. But that particular transaction as
12 reflected on the Government's Chart 17, is the background
13 by which the Urban Expansion money came from for the
14 purpose of the Waikapuna closing and the payments that
15 were later made out to Urban Expansion that went to
16 Constantine, as relates to Lehman's disbursement of moneys
17 following the Lehman closing. As a matter of fact, in
18 Cabo, as relates to a Lehman loan that was actually
19 obtained in Cabo, I believe Phil Kenner testified that the
20 Lehman loan there had a \$125 million prepaid penalty. So
21 the exorbitant prepayment penalties you will see in these
22 hard money loans was not unusual, and I know it gets
23 complicated, ladies and gentlemen, but it's not fraud.

24 So there's no confusion as relates to the
25 knowledge of Mr. Peca in connection with the ultimate

Summation - Haley

5827

1 knowledge that the loan was flowing out of Little Isle IV
2 with the Hawaiian land project to Mexico, we have this
3 testimony.

4 Question: I'm just going to ask you to just
5 read to yourself and specifically for the record, drawing
6 your attention to the question and answer beginning at
7 line 7 and read through approximately 20.

8 I'm sorry.

9 The witness: 30.

10 Mr. Haley: Thank you.

11 Question: Now, does that refresh your
12 recollection as to what you said in 2011 about where the
13 money was going, meaning the money from your line of
14 credit?

15 Answer: Yes.

16 That referred to his prior grand jury tell.

17 Question: What did you tell them?

18 Answer: I asked, basically told them that the
19 Hawaii investment started with the cash investment of
20 100,000 and a line of credit for 1.775 used for Hawaii.

21 Question: And did you indicate or did you say
22 that you knew something about Ken Jowdy getting some of
23 that money at some point in the form of a loan?

24 Answer: It was never in the outset. I never
25 knew when the loan was made to Ken Jowdy or notified when

Summation - Haley

5828

1 the loan was made to Ken Jowdy. We were told well after
2 the fact that the loan was made to Ken Jowdy. There were
3 so many parts in moving investments that just became part
4 of the conversation.

5 Question: In 2011 you will agree with me, you
6 did say that some of that money was a loan to Ken Jowdy?

7 Answer: Correct. At that point I learned that
8 some of the money was to be used to loan to Ken Jowdy.

9 Question: Who told you that the money in your
10 line credit went to Ken Jowdy?

11 Answer: Phil Ken did, but it didn't start out
12 the money from Little Isle IV which belonged to Ken Jowdy.
13 It started out that we made a loan to Ken Jowdy.

14 Question: When did he tell you that?

15 Answer: I couldn't tell you exactly, starting
16 in 2010.

17 So again, ladies and gentlemen, there may have
18 been instances where when the loan was first made to Ken
19 Jowdy, Phil Kenner did not tell, certainly Mr. Peca, at
20 least by his testimony, that it happened, when it
21 happened, he told him immediately but he didn't hide it
22 from his clients and they became aware as indicated by
23 that particular testimony.

24 Your Honor, I'm about ready to move into a new
25 area. Is this an appropriate time to stop?

Summation - Haley

5829

1 THE COURT: We'll break for the day and
2 reconvene on Monday at 9:30. We'll provide you with lunch
3 on Monday. I want to use as much of the day as possible
4 so we'll take a shorter lunch break.

5 So Michelle will use the local deli, and you can
6 check off the menu as you want so we can maximize the time
7 on Monday. I want to remind you don't read or listen to
8 anything regarding the case. Don't discuss the case.

9 Have a great fourth of July weekend. I'll see
10 you all on Monday morning.

11 Thank you.

12 (Whereupon, at this time the jury exits the
13 courtroom.)

14 THE COURT: If everyone will be seated. So how
15 much more do you think you have, Mr. Haley?

16 MR. HALEY: Sorry, your Honor?

17 THE COURT: How much more do you think you will
18 have on Monday?

19 MR. HALEY: May I just reflect for a moment,
20 Judge?

21 THE COURT: Sure.

22 I cannot envision, Judge, going beyond an
23 hour-and-a-half. I hope your Honor appreciates only
24 because of the level of allegations and the quantity of
25 allegations.

5830

1 THE COURT: An hour-and-a-half is okay. If you
2 would say more than that, I would question you, but that
3 is reasonable.

4 MR. HALEY: And I'm confident and I will keep in
5 mind your Honor's suggestion and absolute direction.

6 THE COURT: So I may not instruct them until
7 Tuesday morning. I'm concerned.

8 Based upon that, do you think you'll be two, two
9 and a half hours?

10 MR. LARUSSO: It will be longer to be honest.

11 THE COURT: Longer than two and a half?

12 MR. LARUSSO: I haven't really finished it.
13 Knowing me I'm usually longer than my estimate. I'll try
14 to keep it at that but it may be a little longer.

15 THE COURT: I'll see you Monday morning at 9:30.
16 Have a good weekend.

17 (Proceedings adjourned until Monday, July 6,
18 2015, at 9:30 a.m.)

19
20
21
22
23
24
25

1		5831
2	INDEX	
3		
4	SUMMATION FOR GOVERNMENT	5686
5	SUMMATION FOR DEFENSE	5767
6		
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		